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No. 593

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

against

HYMAN HARVEY KLEIN, MAURICE HAAS, and MORRIS O. ALPRIN,
Defendants-Appellants,

and

ISIDOR J. KLEIN, ALBERT McLENNAN, GEORGE NORGAN, ELLIS ROSENBERG, IRVING A. KOERNER and ALBERT ROER,
Defendants.

THE KLEIN REPLY BRIEF AND APPENDIX

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THE KLEIN REPLY BRIEF

It is not practicable within the compass of this reply to expose all the errors in the government's brief and appendix. We here point out the more flagrant.

Major Errors of the Prosecution

The Attempt to "Reargue" the Acquittal on the First Four Counts

The government reargues the first four counts in utter disregard of the acquittal of appellants on those counts.[1]

The section euphemistically called "The Facts" is a spectacular example of this (Gov. Br. 4-35). The government's recital is seasoned with innuendo and epithet. As with the jury, an attempt is made to convince this Court that "whiskey", "tax-consciousness", "tax opinions", "corporations" and "OPA price-setting" are inherently sinister. The entire Harwood venture—its conception and organization, the formation of the corporations, their con-

[1] Judge Sugarman's opinion, reported at 139 F. Supp. 135 long before the government filed its brief on March 7, 1957, is not even cited.

tracts and transactions with R. C. Williams, the tax opinions they obtained, their methods of distribution and delivery, the sale of Klein's interests and his acquisition of the sole proprietorship of Tivoli—all this is treated as if it were a monstrous tax fraud, despite the decision of the trial court that none of it constituted tax evasion or conspiracy to evade—a decision, it should be noted, that is based on the very facts which the government's brief discolors and distorts.

In holding that the prosecution's evidence was insufficient to make out even a prima facie case on the first four counts, Judge Sugarman, after summarizing these facts in a "recital most favorable to the government", stated (139 F. Supp. at 137-38):

> "Such test requires that it be assumed on this motion that this syndicate was erected by the American resident defendant Klein and his three Canadian associates as a tax maneuver; that a contract with an American importer under which almost half of the whiskey was sold was shaped and supplemented so as to except from United States income tax the profits realized thereunder, that that contract reserved to Klein and his associates dominion over the approval and even selection of salesmen for the American importer and wholesalers to whom it sold and of allocations of the quantities of whiskey to be sold; that in the performance of this contract and all other sales into the United States, defendant Klein, for himself and his associates was the indisputable dominant figure; that Klein and his associates dictated the policies of the seventeen Panamanian and Cuban corporations and of the importers insofar as they concerned this whiskey; and finally that the syndicate and operations in the United States and elsewhere for the entire period were scrupulously geared to gain the immunity suggested by tax counsel (another defendant—Haas) under the decisions of East Coast Oil Co., S. A. and Ronrico Corp.
>
> Under this state of facts the government contends that the jury could find that the seventeen Cuban and Panamanian corporations were mere empty shells and a sham or device to escape United States income taxes and that therefore the profits ostensibly of the syndicate were in truth those of Klein and his Canadian joint venturers.

> In my view, the Government's position on the first four counts is untenable."

It should also be noted that in discussing the facts the prosecution completely ignores the trial court's charge that

> "The evidence as to events that occurred prior to June 1, 1946 is to be received and considered by you *only as historical background* to establish the relationship of the parties prior to the commencement of the alleged conspiracy on June 1, 1946, *and for no other purpose*" (IV, 2553).*

Nevertheless this very "background" is now used by the prosecutor not as historical prelude but as direct evidence in an attempt to sustain the fifth count and the jury's verdict.

The Use of Half-Truths in Misleading Headlines

Half-truths are not only reiterated but magnified. Klein is headlined as setting up the Harwood venture "With a Mind for Taxes" (Gov. Br. 6) and as having "Manipulate[d] the Profit-Taking into Utter Confusion With a Mind for Taxes" (p. 9); while Tivoli is headlined as "The Maverick Panamanian Corporation" and is said to have had "no apparent paper function" (p. 13). The evil imputations of these headlines, that there was tax-evading intent and tax evasion by "manipulation" of profits and that the Harwood corporations were a fraudulent hoax, reach their climax in the "punch line":

> "The whole Klein system was worthy of that master artificer, Samuel Insul. Klein's purpose: taxes" (p. 13).

But the punch line and the headlines are completely dissipated by the trial court's decision

> "* * * that the seventeen corporations were acceptable entities for tax purposes and not a sham and that their income was theirs and not that of Klein and his three Canadian associates. Klein therefore did not * * * attempt to evade individual income taxes in 1944, 1945 and 1946" (139 F. Supp. at 140).

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* Throughout, italics within quotations are ours unless indicated otherwise.

Significantly, this holding was made on the assumption that "the syndicate and operations in the United States and elsewhere for the entire period were scrupulously geared to gain the immunity suggested by tax counsel" (*id.* at 138).

The Improper Attempt to Charge Klein with Evasion of His 1947 Income Taxes

Repeatedly, the government attempts to show that Klein's 1947 income was not correctly reported in his 1947 return. Having specified in its bill of particulars that Klein's 1947 return was false in one and only one particular—*that it reported ordinary income as capital gain*—and having failed to prove that charge, the prosecution now contends, under the guise of supporting the fifth count conviction of Klein, that his 1947 return was false in an entirely different respect—*that the capital gain reported was not correctly computed* (Gov. Br. 17-24, 41-43, 45-46).

Klein has never been indicted on such a charge. Indeed, elsewhere in its brief the government states that "Count 5 did not charge a conspiracy to violate 26 U. S. C. §§ 145(b) or 3616(a)", and that "Count 5 had nothing to do with income tax evasion of the three Canadians and Klein as such" (Gov. Br. 75, 78-79). The trial judge repeatedly ruled that the correctness of Klein's 1947 return had no relevancy to the fifth count (*e.g.*, III, 1634-35). And when the prosecutor improperly persisted in arguing to the contrary in summation the court intervened, saying:

> "And I remind you again * * * that Mr. Klein is not on trial for attempting to evade income taxes. That was thrown out weeks and weeks ago" (IV, 2517).

In charging the jury the judge said:

> "I charge you that it is not claimed by the prosecution that the filing of the defendant Klein's income tax return for the years 1944, 1945, 1946, 1947 or for any other year was any part of the conspiracy charged in the fifth count" (IV, 2569).[2]

Despite these rulings and in complete disregard of them, the government now confronts Klein with contentions that

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[2] The government did not take issue with this instruction (IV, 2597-98).

his 1947 return was fraudulently prepared. Under the headline "The Supposed Sell-Out of January 1947" it is strongly suggested that Klein's sale of his interests in the Harwood companies (except Tivoli) was mere pretense (Gov. Br. 19). In fact, later the statement is made that "the Canadians never owned any part of Tivoli" and that "Klein did not pay $375,000 to the three Canadians for Tivoli" (Gov. Br. 46). But the trial proceeded on the basis that the sale was real if the corporations were genuine. The trial judge in acquitting found the corporations (including Tivoli) were genuine and accordingly treated their "liquidation", or sale, as real (139 F. Supp. at 137).

Again, under such derisive headlines as "Haas Prepares a 'Proper' Combined Balance Sheet" and "the $1,500,000 'Error' " (Gov. Br. 17), an effort is made to show that in computing the value of Klein's interest in the Harwood enterprise preparatory to the sale, Haas and Klein "conspired" to transform a $1,500,000 asset of Tivoli into a Tivoli liability by changing the item into a "loan receivable" of Regan Potter (Gov. Br. 17-19). It is also claimed that even if this was the correction of an honest mistake, the computation of Klein's capital gain in his 1947 return was short by $375,000 (Gov. Br. 45-46). Yet again, it is implied that the rider to Klein's 1947 return regarding the Hannes reorganization was false (Gov. Br. 45). But all these belated accusations relate solely to the correctness of Klein's 1947 return—a matter not involved in the fifth count—but nevertheless injected here to prejudice Klein's position before this Court.

The References to Irrelevant and Prejudicial Matters Excluded by the Trial Court

Repeatedly references are made in the government's brief to matters excluded by the trial judge. In one of his many allusions to the $1,500,000, indeed under the garish headline "$1,500,000 Disappears: April 3, 1947" (Gov. Br. 23), the prosecutor in a footnote stage-whispers that he offered to prove that Haas had received this amount in United States certificates of indebtedness which he converted into currency and "that Klein and Haas lied to Treasury officials about these facts", adding that "the trial judge excluded the line" (Gov. Br. 24). In fact, the prose-

cutor goes so far as to print part of the rejected offer of proof in the government's appendix (pp. 27a-38a).

Again, threaded throughout the prosecutor's recital of the facts are subtle and cynical references to the OPA (Gov. Br. 5, 6, 14, 15, 16, 17, etc.). Koerner is miscalled "a Ceiling Price Setter for the OPA"; Klein's "problem" is said to have been to "market whiskey in the United States—and at a good OPA-approved price"; and we are told that early in the Harwood venture, "Klein was in contact with Irving Koerner of both the OPA and * * * R. C. Williams * * *" (Gov. Br. 5-6).

These undertones of a Klein-Koerner conspiracy to fix OPA prices by fixing OPA are as irrelevant as they are prejudicial; particularly so, in view of the trial court's refusal from the very outset to permit the government to inject alien charges that there had been OPA fraud in fixing the price of Harwood whiskey (131 F. Supp. 807-818).

Errors of Commission and Omission in the Appendix to the Government's Brief

Special comment is directed to those major portions of the appendix to the government's brief which unfairly treat the record.

The use in an appendix of argumentative and misleading headlines is not, we submit, authorized by Rule 15 of this Court. But our criticism is founded more particularly upon the erroneous impressions created by these headlines as used in conjunction with decimated parts of the record.

Thus, the portions of the record printed under Headline II reading "Klein Welcomes Haas' Opinion Letter (Exh. 8)" emphasize that when this document was first offered by the prosecution—while the first four counts were still in the case—Klein's counsel asked "that it be received not only against him but in his favor" (Gov. App. 16a-18a). As it stands alone, this excerpt indicates that Klein waived the objection which he now raises to the relevancy of this document to the fifth count (Kl. Br. 88-91). However, the prosecutor does not advise the Court that after the acquittal on the first four counts Klein moved to strike the Haas opinion (G-8) upon the ground "that the four counts having been eliminated it is not material to the fifth count". The motion was denied (II, 815-16) and its

denial is urged on this appeal, and properly so, as error (see *infra*, pp. 48-50).

Under Headline III reading "Government Agents Made Available to Appellants as Witnesses", the prosecutor reproduces portions of a colloquy indicating that Special Agents Victory and McCarthy were "available" and were still employed in the Bureau of Internal Revenue in New York City (Gov. App. 19a-20a). But the prosecutor omits a subsequent part of the colloquy where in effect he withdrew his offer to make these agents available as witnesses to appellants. In the course of the omitted portion the prosecutor agreed with the court that he didn't "want to bring them" (T. R. 3419). The necessity for bringing the agents arose in connection with the offer by the government of the Alprin statement to Internal Revenue (G-264), in which certain changes had been made by Alprin which the trial court thought should be explained by the Special Agents. When, therefore, the judge received the Alprin statement in evidence its receipt was "conditioned upon and subject to the production by the Government, which the Court now directs, of Thomas J. Victory and William McCarthy, so that the defendant Alprin may have an opportunity to examine them with respect to any changes in the statement" (T. R. 3420). Then the prosecutor, stating that "the Government does not intend or did not intend to call these witnesses" and that "it has no desire and no intention at this time of calling them as Government witnesses", withdrew the Alprin statement from evidence and in its place proceeded to have the stenographer who transcribed the statement testify as to its contents from his notes (T. R. 3421-22). Thereupon, the court expunged its rulings with respect to the admissibility of the statement and returned the document to the government (T. R. 3422).

In Headline IV reading "Testimony of Government Agent on Asking Klein, in October of 1946, About Income Tax Returns (Stricken by Trial Court)" the government, without any semblance of justification, includes stricken testimony of an OPA investigator that, when in the Fall of 1946 OPA agents asked Klein where he filed his income

tax returns, Klein replied it was none of their business (Gov. App. 20a-26a). Reference to this excluded testimony is also made in the government's brief (p. 17).

Since the prosecutor presumed to print any part of this stricken testimony, we think that in fairness he should also have printed the trial court's reasons for striking it:

> "I absolutely see no connection whatsoever between an investigation of the Office of Price Administration and the fact that you expect a man to gather from that that the United States Government was investigating his income tax status" (II, 1062).*

Under Headline V reading "Offer of Government to Trace the Disappearing $1,500,000" (Gov. App. 27a-28a) the prosecutor sets forth an offer of proof which was rejected, in which the government sought to trace—without being able to show by competent evidence its ultimate destination—$1,500,000. We can find no warrant whatever for the printing of this rejected offer of proof. In view of the persistent insinuating references to this $1,500,000 in the government's brief, we can conclude only that the purpose is to attempt to engender a suspicion of wrongdoing based upon what the trial court rightly described as "wild speculation" (T. R. 5130).

In rejecting the offer, the trial judge reminded the prosecutor that the fifth count conspiracy was one of concealment of the business activities and the source and nature of defendants' income; and he held that "what was done with the $1,500,000 in certificates utterly fails to disclose any more than has already been established by the proof * * * as to the business activities of the defendants and the source and nature of their income" (T. R. 4413-14).

The court then added a statement showing that at least at this stage of the trial he was firmly set against enlarge-

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* Nevertheless the trial court refused to strike testimony that $8,000,000 in corporate bonds had been transferred to Canada at Klein's instructions following advices from Holohan of The Royal Bank of Canada that the bank had received *an OPA subpoena* calling for the production of corporate records (See discussion *infra*, pp. 43-45).

ment of the crime charged in the fifth count or substantial alteration of the indictment. He stated:

> "Furthermore, the fifth count, fairly read, charges the defendants therein named with a dishonest concealment of the nature of their business activities and the source and nature of their income by the filing of partly false returns of Alprin, Koerner and Roer. It is utterly silent as to false statements, if any, to the Government about the disposition of the certificates that impeded, impaired, obstructed, defeated or defrauded the Government in its tax collection function, as is the bill of particulars. In the light of such silence the defendants cannot be now held to answer a charge not contemplated by the indictment or the bill of particulars" (T. R. 4414).

After this adverse decision the government enlarged its offer of proof (T. R. 4420-54A). None of this renewed offer is reproduced in the government's appendix, nor is the court's decision rejecting it.

The trial judge, when requested by the prosecution to reconsider, prepared a short memorandum decision, also not printed by the government, in which he stated that, "left unexplained", the disposition of $1,500,000 in certificates "invites the jury to embark upon a course of wild speculation as to why the certificates were cashed and what might have happened to the proceeds". And he said:

> "The bald recital of the negotiations of the certificates, without further explanation, would constitute reversible error" (T. R. 5130).

We should add that the offers of proof as to this matter were regarded as so violently prejudicial to the defendants that they were made in chambers, and the unusual precaution was taken of impounding the stenographic transcript until conclusion of the trial (T. R. 4416-20, 5132). Therefore, the reference to this excluded testimony in the government's brief and appendix would seem to be particularly unwarranted and utterly indefensible.

Under Headline VI entitled "Trial Court's View of the Difficulties of Proof Under Counts 1 Through 4", the government's appendix sets forth a statement by Judge Sugarman in rejecting the offer of proof regarding the

$1,500,000 that "the indictment was brought against the wrong people for the wrong crime" (Gov. App. 38a-39a). With this view we heartily agree—just as strongly as we disagree with the prosecutor's tactic of including in the government's appendix what the trial judge himself called a "curbstone or horseback opinion" (T. R. 4446). Of course, the "difficulties of proof" under the first four counts can have nothing whatever to do with this appeal from a conviction on the fifth.

Under Headline VII the prosecutor reproduces portions of a colloquy designed to indicate, as the caption reads: "The Trial Court's Realization That Its Procedure on the Admission of Evidence Created Many Problems and Might Have Been a Mistake" (Gov. App. 39a-49a). What possible relevance has this to the instant appeal?

Under Headline VIII reading "The Court's Suggestion on the Preparation of 'Dossiers' and Its Rejection", there are set forth (Gov. App. 50a-55a) portions of a colloquy indicating the court suggested that exhibits and testimony remaining in evidence after the motions to strike should be placed in dossiers and in that form made available to the jury during its deliberations. The impression is given that this offer was rejected *by the appellants alone*, and particularly Klein's counsel.

Omitted from the colloquy is the following statement of the prosecutor:

> "Mr. Bauman: Judge, I will be perfectly frank with you and say that *I intended from the time your Honor mentioned it to object to this procedure*" (T. R. 6964).

There is also omitted the concluding remark of the trial judge:

> "At the time we discussed it it looked likely but what has developed since that time is indicative to me that *you are all* on absolutely firm ground in saying that you don't want any part of it. I disown it" (ibid.).

None of this is relevant to this appeal.

Under Headline IX entitled "The Agreement to Enter a Stipulation on the Travels of Money into Canada (Never

Executed by Appellants)", selected portions of the record are set forth and the impression given that counsel for the appellants repudiated a stipulation they had made (Gov. App. 56a-60a). This is another noteworthy irrelevancy and twisting of the facts. Although such a stipulation was discussed, it was never agreed upon. The trial court at the very end of the case called this to the attention of counsel and said that in the absence of a stipulation he would not "permit any reference to anything beyond the $8,000,000 [in corporate bonds transferred to Canada] on summation". Thereupon the trial prosecutor stated:

> "Mr. Bauman: That is *satisfactory*, your Honor" (IV, 2278).

So much for the appendix.

The Unjustifiable Imputation of Bribery to Klein and Internal Revenue Agents

To return to the government's brief, we deprecate the position the prosecution has taken in its response to the emphasis in Klein's main brief on the failure of the government to call even one Internal Revenue Agent to testify that appellants' conduct impeded or had a tendency to impede collection of their taxes. In retorting, the prosecutor does not rely even on excluded evidence. He relies on no evidence whatever. He states in a footnote:

> "Klein knows that there was good reason for the Government not delving into the difficulties which Treasury agents had in this case to discover the truth; for the agent in charge of the initial stages of this investigation was Daniel Bolich, who at the time of trial stood convicted of conspiring with Henry Grunewald to fix tax cases" (Gov. Br. 50-51).

This slanderous imputation of tax-fixing propensities to Treasury agents and of actual tax fixing to Klein is wholly without support in this record. We condemn it as an indefensible attempt to excuse the failure of the government to produce testimony from any Treasury agent that the governmental function of collecting income taxes was impaired, impeded or defeated by Klein. Clearly no such testimony was obtainable and it is apparent that the Treasury agents, who admittedly were "available" to the prose-

cution (Gov. App. 19a-20a), if called, would have been compelled to testify directly to the contrary.

These are by no means all the instances of unjustifiable arguments and practices indulged in by the government. Others will appear in the discussion which follows. Enough has been indicated, we trust, to alert the Court to their existence.

POINT I

The Concessions in the Government's Brief Emphasize the Reversible Error That Was Committed in Receiving in Evidence Against Klein the Roer and Koerner Statements to Internal Revenue.[4]

The Roer and Koerner Statements Were Presented to the Jury As True and Seriously Prejudiced Klein

The government, although it refused to take any position at the trial, now at last concedes[5] that "the only way" the Roer and Koerner statements to Internal Revenue "could be admissible" is if "they were false or misleading", and "thus made in furtherance of the conspiracy" (Gov. Br. 94).[5]

But at the trial the prosecutor presented to the jury important parts of these statements contradicting Klein *as true* and *as proof of his guilt*.[6] In summation, referring to the holding of the Alprin, Koerner and Roer drafts, he said:

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[4] In reply to government's Point 9, pp. 92-98.

[5] This was precisely our position at the trial (II, 1168, 1175-76, 1194-95). If offered wholly or in part as proof of the truth of their contents, the statements were objectionable as hearsay. V Wigmore, Evidence § 1361 (3 ed. 1940). And obviously a statement of the truth cannot further a conspiracy to defraud.

[6] The prosecutor, in urging the trial court to retain portions of the Koerner and Roer statements over appellants' motions to strike, did so on the ground that those portions were in *furtherance of the fifth count conspiracy*, but refused to take a position as to which of these portions the government was offering as true or false (II, 1031-36, 1165-81, 1192-97). He thus straddled the issue and was permitted to do so even though it was brought to his attention and that of the court not only that portions of a particular statement might be in furtherance of the conspiracy and other portions not, but also that a jury of laymen would likely find it impossible to recognize the distinction (T. R. 6096-98).

"Now why? Why were these drafts held? I want to read two questions and answers *from the statement of Mr. Roer* which was received in evidence.

'Q. Did Mr. Klein say to you at the time that he gave you this draft in 1947 the reason why you should hold the draft? A. He mentioned something about having a little trouble on his income tax and that as soon as he gets that straightened out he would want me to deposit it.'

And by Mr. McCarthy:

'Q. What do you mean he said he was having a little trouble with his income tax? Did he elaborate? A. No. He said he was having some difficulty with the income tax, to hold the check until he gets cleaned up and then he will advise me when to deposit it.'

Mr. Alprin told you substantially that story on the witness stand, and *isn't that the fact?*[7] Mr. Klein was having a little trouble with his income tax. 'Take the $800,000, put it out of sight. Hide it away until I get my troubles with the income tax cleaned up.'

And if that is true—and you have no reason to disbelieve that—you have no reason to disbelieve that—there can be no question that Mr. Klein's sole purpose in burying that $800,000 was to confound, confuse and impede, and all the rest of the charges made, the Revenue Service.

* * *

So that you have, it seems to me, *a practical admission from Mr. Klein* that these drafts were held pursuant to his instructions and *because of his difficulties.*

He tells you OPA difficulties. I say to you not OPA difficulties, income tax difficulties" (IV, 2508-09).

The government has not challenged the statement in our main brief that

"* * * *this testimony of Roer's is the only evidence in the case that Klein was in income tax difficulties when he issued the drafts on March 27, 1947*" (Kl. Br. 76).

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[7] The prosecutor later corrected himself and admitted that Alprin had not so testified (IV, 2525-27); see Klein main brief, footnote p. 77.

Actually, this hearsay was used as a separate, self-sufficient basis for convicting Klein. For the prosecutor told the jury they could find the drafts were "neither a liquidating dividend nor income to Koerner, Alprin and Roer," because

> "* * * it might have been given to them for a purpose other than that claimed by either side to this controversy, *and that it was to be given the appearance of a legitimate expenditure until the conclusion of Klein's income tax difficulties, after which it would be disposed of in some manner to be determined by the parties*" (IV, 2528-29).

The trial court instructed the jury:

> "You could also find that at the time when the drafts were delivered to Alprin and Roer they were either a liquidating dividend or compensation or a gift, *but with a condition attached.* You could find that there was an understanding that they were *to be held pending the determination of the tax consequences of the syndicate's operations.* It might be found that it was agreed that Alprin, Koerner and Roer were not to receive their liquidating dividend or compensation for services or gift *until the tax, if any, to be assessed against Hyman Harvey Klein or his corporations or his three Canadian co-venturers and him, on the income resulting from the whiskey selling venture, was determined*" (IV, 2575).

And so the jury were permitted and indeed urged to accept *as true* this rank hearsay based on Roer's *ex parte* statement and to use it, *although true*, as a statement in furtherance of the alleged conspiracy to convict Klein.[8]

In fact, many other parts of the Roer and Koerner statements, retained in evidence at the prosecutor's insistence

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[8] It should be observed in passing that if Klein had been "having a little trouble on his income tax" it would have been perfectly simple for the government to introduce direct and positive testimony to prove that fact. It would have been wholly unnecessary to resort to the inadmissible hearsay statement of Roer. Why was not a single one of the "available" government agents among the scores who had investigated Klein's income taxes called by the government to testify that in 1947 when the Alprin, Koerner and Roer drafts were issued, Klein was "having a little trouble on his income tax"?

despite Klein's motions to strike, were submitted to the jury *as true* and as contradicting and incriminating Klein (II, 1165-81, 1192-1200). These same parts, although their source is not specifically identified, are adopted as *true* in the government's brief on this appeal. They are as follows (see Klein main brief, 16-22):

> 1. The drafts were made out to Cuban corporations by Klein on his initiative and not at the request of Roer and Koerner (I, 234, 366).
>
> 2. The so-called "June of 1946 corporations" were formed at Klein's instructions (I, 363-65).
>
> 3. Klein in delivering the drafts said they were not to be used until released by him (I, 363-65).
>
> 4. When Klein gave these instructions he said he was in tax difficulties (I, 376-77).
>
> 5. When Roer deposited his draft on March 27, 1950 he did so at Klein's request (I, 369-70, 376).
>
> 6. Alprin repeatedly told Koerner that Klein would not release Koerner's draft (I, 237).
>
> 7. Throughout 1947-52 Koerner asked Klein repeatedly for his draft and Klein said he could not release it (I, 239).
>
> 8. Koerner's draft was finally released on instructions from Klein (I, 237-39).
>
> 9. Roer relied on Klein's instructions not to use the draft as the sole reason for not reporting the proceeds in Roer's 1947 income tax return (I, 376).

Other parts of the Roer and Koerner statements, on which depends the honesty of their returns, are just as obviously now regarded as *false* by the prosecutor (Gov. Br. 47-48, 54-55). For example that

> 1. Roer and Koerner subscribed to Tivoli stock which Klein held for them (I, 230, 231-33, 318-19, 368, 370, 372, 374, 379).
>
> 2. Their Tivoli stock subscriptions were never cancelled (I, 239-41, 372).
>
> 3. The Koerner and Roer drafts were in liquidation of their Tivoli stock interests (I, 231, 234, 365, 368).

But, peculiarly indeed, these very statements which the prosecution now frankly treats as *false* and therefore made

in furtherance of the conspiracy, were also flatly *contradicted by Klein*, the alleged arch-conspirator!

The government's contention, that even if inadmissible all this was harmless, affronts intelligence. The prosecutors actually refute themselves, for they say Roer's statement to Internal Revenue that Klein said he was in tax difficulties "*went to the question of tax motive*"—a vital part of the government's case (Gov. Br. 95).

Moreover, the Roer and Koerner statements, together with those of Alprin and Haas, constituted the major part of the government's case in chief. Through these statements the prosecutor staged for the jury's benefit a head-on collision, not merely between Klein and Alprin, but between Klein on the one hand and Alprin, *Koerner and Roer* on the other. Although Alprin testified as a trial witness, Koerner and Roer did not; and their *ex parte* statements were used throughout to corroborate Alprin and contradict Klein. Since these statements "supplied strong confirmatory or supplementing proof", if it is shown "or *even were doubtful*" that they were improperly received, "reversal would be required". *Blumenthal* v. *United States*, 332 U. S. 539, 551 (1947).

The Roer and Koerner statements were far more than merely corroborative. They independently supplied essential evidence to the prosecution. To select but one outstanding example—Roer's statement that Klein said he was in income tax difficulties when the drafts were issued supplied the only evidentiary basis in the case for the possible conclusion that the "holding" of the drafts was wrongful, indeed criminal, because impelled by a tax impeding motive. As such, the statements were so prejudicial not only to Klein, but to Alprin as well, as to require reversal of their conviction. *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (2 Cir. 1957).

The trial court's charge referred not merely to the conflict between Klein and Alprin; he told the jury they might "consider the *conflict* between the statements of Klein and Rokoff on the one hand, and Alprin, Haas, *Koerner and*

Roer on the other" in determining "the intent with which the defendants are said to have acted". He described this intent as the "cardinal element of the accusation in the indictment". He said this "question of fact" was "the heart of this case" and one for the jury "to determine on *all the evidence* and under the instructions contained in this charge" (IV, 2582-83; and see IV, 2572-81). A vital part of that "evidence" consisted of the inadmissible Koerner and Roer statements to Internal Revenue.

These statements were far more damaging to Klein than the statement of the co-conspirator, Whitley, was to his co-defendant, Delli Paoli, in *Delli Paoli* v. *United States*, 352 U. S. 232, 243-246 (1957). Yet there, although Whitley was tried with Delli Paoli and Whitley's statement was received only as against Whitley, with "an emphatic warning" to the jury that the statement might not be used against Delli Paoli, Judge Frank of this Court (229 F. 2d 319, 322-324) and four members of the Supreme Court regarded Whitley's statement as so prejudicial to Delli Paoli that it should not have been admitted at all upon the joint trial of both defendants. *A fortiori*, the far more "damning" prejudice to Klein created by the Roer and Koerner statements, which were expressly taken as against him (II, 1168-69, 1194-95, 1311, 1335), requires reversal of Klein's conviction.

The Reversible Error Was Not Waived

The government suggests the error was waived because Klein did not request a specific charge that the Roer and Koerner statements could be in furtherance of the conspiracy only if false (Gov. Br. 93).

In the first place, that is the kind of charge Koerner and Roer would likely have requested on their own behalf had they remained defendants in the case.[9] Secondly, it would

[9] The trial court at Klein's request charged that if the jury found the drafts were an unconditional payment of a bonus, commissions or compensation to Alprin, Koerner and Roer, then they could not find that Klein's testimony to that effect before the Special Agents was an act in furtherance of the conspiracy. Alprin's similar request to charge was also granted (IV, 2576-77).

have been self-contradictory and extremely hazardous for Klein to suggest that the jury might find the Koerner and Roer statements were true, since they contradicted him at so many important points. Thirdly, it would have required a cerebral contortion, beyond even the presumed competence of jurymen, to find that the Koerner and Roer statements were true, yet nevertheless to follow an instruction that the statements, if true, and for that very reason, could not be used against Klein whom they incriminated.

These practical difficulties demonstrate the fallacy of the government's contention that whether the statements were in furtherance of the conspiracy was "for the jury to determine", and that if "in furtherance of a conspiracy of which [Klein] was a member they were properly admitted" (Gov. Br. 93).[10] This view, that ultimately the factual basis for the admissibility of a statement of one alleged co-conspirator against another should be determined by the jury, is directly contrary to a decision of this Court cited by the government in support. In *United States* v. *Nardone*, 127 F. 2d 521, 523 (2 Cir. 1942) Judge Learned Hand stated:

> "The competency of evidence is for the judge alone; any question of fact upon which it depends he must decide; if he admits it the jury may use it like other evidence—for whatever it proves to their minds—they can have no concern with rulings about evidence which, so far as it is possible, ought to be kept from their notice."

Therefore, the matter was not for the jury at all; and the request to charge, which the government now claims Klein should have made, would have been inappropriate and wholly inconsistent with Klein's position that the question was one for the trial court.[11]

In any event, Klein was not required to request such a charge because he had made his position clear when he

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[10] The trial judge fell into the same error (11, 1169).

[11] It was to enable the trial judge intelligently to perform this non-delegable function that defendants urged that the prosecutor be required to state whether the parts of the Roer and Koerner statements offered by him were being offered as true or false. The prose-

moved to strike the Roer and Koerner statements (II, 1175-76, 1193-95). The trial judge refused to strike, ruling erroneously that whether the statements were true or false was "a factual question to be determined by the jury" (II, 1169). Having made the point, counsel were not required to make repeated and futile assaults on the trial court's ruling. As the judge said in dealing with a supplemental request to charge, "Why encumber the record with that which you know I am not going to do?" (IV, 2596.)

If the Roer and Koerner Statements Were False, They Were Not in Furtherance of Any Conspiracy of Which Klein Was a Member When They Were Made

The prosecutors state "the Roer and Koerner statements could be and were in furtherance of an existing conspiracy to defraud" (Gov. Br. 93).

In what respects did these Roer and Koerner statements further a conspiracy to impede the collection of Klein's income taxes or to conceal the nature and source of Klein's income? In connection with his own tax liability Klein has always maintained that originally Tivoli was owned by himself and the three Canadians in equal shares; that as part of the sell-out of his interests in other Harwood corporations he purchased the three-quarter interests of the Canadians in Tivoli; and that after this purchase on January 10, 1947 Klein became and remained sole owner of

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cutor's refusal to take a forthright position was shrewdly calculating (II, 1168-69). If his theory was that the parts of the statements offered were true, then even by his own present belated admission, they could not be in furtherance of the conspiracy and would have been inadmissible. If, however, his position was that they were false, then he would have been forced to concede that the contradicting parts of Klein's statement to Internal Revenue were true and therefore (1) inadmissible against Haas and Alprin because not in furtherance of the conspiracy, and (2) not evidence for the jury to use against Klein as assertions by him in furtherance of the conspiracy. The government's refusal to take a position one way or the other proved an effective dragnet for getting selected portions of all the statements to Internal Revenue, *i. e.*, Klein's, Roer's, Koerner's, Alprin's and Haas', before the jury and thus to present them with such a welter of contradictions that they would find it impossible to determine whom to believe and would indiscriminately conclude that all were lying and all were guilty.

Tivoli stock. Klein consistently asserted this position in his discussions with Internal Revenue beginning in 1949 (III, 1705-12, 1715). He did so in response to the very interrogatories which, the prosecution claims, he answered falsely in order to protect Alprin, Koerner and Roer (Gov. Br. 28). Yet, Roer and Koerner in their statements to the Special Agents directly contradicted Klein by asserting their stock interests in Tivoli; and if their claims were credited, Klein's position before the Bureau was blasted at its very foundations.

Clearly, then, the Roer and Koerner statements were not made to protect Klein; and if they were false, as the government *now* definitely claims, Roer and Koerner lied to save themselves, not Klein.

On the other hand, the government insists that at the very time they were lying about Klein, he was trying to cover up for them—to conceal the sources of *their* income. Despite Klein's earlier position taken with the Bureau in 1949, the prosecutors say he "did not challenge the capital gain version based on Tivoli ownership and take square issue with Roer, Koerner or Alprin until weeks after they had testified" in 1952 (Gov. Br. 94). The prosecution overlooks the fact, however, that although Roer and Koerner were questioned before Klein, *in advance of their interrogation* the Special Agents had obtained from Klein's files the documents signed by Roer and Koerner acknowledging the cancellation of their subscriptions to Tivoli stock and the refund of their subscription money, with which the Agents confronted them with such devastating effect (I, 239-41, 372, 651-52).

Moreover, in September 1951 Roer had filed a return in which his draft was reported as a liquidation of his shareholdings in Tivoli (G-348). Alprin and Koerner had filed declarations of estimated tax in early 1952 (FH) and both informed the Special Agents of their intention to report their drafts as capital gains in 1953 (I, 238, 241, 308, 310, 315), a purpose which they deliberately carried out (G-253, G-347).

These assertions of capital gains were, of course, directly contradicted by the receipts which Roer, Alprin and Koer-

ner had signed and delivered to Klein (G-388). Therefore, it became important for the Special Agents to determine whether Klein, supported by the receipts (G-348) and the Tivoli ledger entries (G-380), was telling the truth in asserting that the Roer, Alprin and Koerner drafts were ordinary income, or whether Roer, Alprin and Koerner, although contradicted by these documents, were telling the truth in claiming that the drafts were a liquidation of their Tivoli stock interests and therefore a capital gain.

It is of vital significance, we believe, that the Special Agents in recommending criminal prosecution and the grand jury in indicting, determined that Klein's version was correct and that the Roer, Koerner and Alprin income tax returns were false (I, 128-29, 143-44). In the face of these official determinations made after searching investigation, the present charge leveled against Klein that he conspired with Alprin, Koerner and Roer in the filing of their false returns to impede the government in the collection of their taxes is simply incomprehensible.

The government also asserts that Klein, still trying to protect Alprin, Koerner and Roer, had not, when they were being questioned by the Special Agents, "even given Treasury officials the Tivoli *stock* records although requested to do so" (Gov. Br. 94).[12] But the prosecutor does not mention that the Special Agents were given possession of the *Tivoli journal on July 30, 1952* (G-380), three months before Koerner and Roer were questioned (I, 228, 361). And the journal entries show the drafts were "commissions paid" and contradict flatly the Roer and Koerner claims of "liquidating dividends" and capital gains.

Finally, the prosecution concedes the Alprin statement was not made with Klein's connivance. For it says: "Klein did not even know that Alprin was going to base his capital gain claim on Tivoli ownership until sometime after October 1952" (Gov. Br. 94). This, according to

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[12] This implies that Klein refused to produce the stock records. He did not. When asked where they were he said he did not know but thought they were then [1949] in Cuba or Canada (III, 1710-13). There is no proof this was false.

Alprin, was after his "second [and last] interrogation" by Internal Revenue (IV, 2188-89).

There was even greater lack of cooperation—there were divisive differences—between Klein and Roer. Elsewhere in its brief the prosecution says that in the Fall of 1950 Klein knew Roer was claiming his draft as a capital gain (Gov. Br. 30). Yet, on that very same occasion Klein refused Roer a letter from Tivoli to support Roer's claim (I, 675-76; III, 1541-42, 1695-96). This was two years before Roer and Klein were questioned by Internal Revenue. Klein therefore certainly was not a co-inventor with Roer of Roer's basic claim of Tivoli stock ownership and capital gain.

If then, as the government now definitely asserts, the Koerner and Roer statements to Internal Revenue were false, they lied to save themselves at Klein's expense and at the incalculable cost of Klein's liberty. To say they were conspiring with Klein, or he with them, in their perjurious incrimination of Klein is a fantastic absurdity.

Just recently this Court unanimously reversed a conviction because of the improper reception in evidence against the appellant of statements of an alleged co-conspirator because (1) appellant was not shown by competent evidence to have been a party to the alleged conspiracy and (2) the statements were not made in furtherance of the alleged conspiracy. *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (February 20, 1957). The very same grounds for reversal are present here.

POINT II

The Evidence Failed to Establish Any Conspiracy Under the Fifth Count of Which Klein Could Properly Be Convicted.[13]

The Indictment and Theory of the Case

The indictment itself and the prosecutors' discussion of it (Gov. Br. 36-38) show that neither Klein's income nor

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[13] Replying to government's Point I (Gov. Br. 35-55) and, so far as relevant, to the government's statement of the "Facts" (pp. 4-35).

Klein's taxes were involved in Count 5. The charge is bottomed upon the Alprin, Koerner and Roer drafts. As the trial court said in construing the fifth count:

> "Even though the bank drafts, which represented these payments, were obtained in March of 1947, they were delivered with Klein's instructions (which Klein disputes) that they be not cashed and the proceeds thereof did not find their way into the hands of Roer until 1950, and Koerner and Alprin in 1952. Roer in 1950 and Koerner and Alprin in 1952 reported them as capital gains under a liquidation of Tivoli in their several tax returns for the year in which they were cashed. *The government charges in Count Five that this constituted a concealment of the nature and source of the income that was designed to impede, impair, obstruct and defeat the Treasury Department in its collection of revenue and that it was the product of a conspiracy to so do.*" (139 F. Supp. at 141.)

The prosecutor on this appeal takes the same position as did the grand jury—that the reporting of these drafts as a capital gain was "*false*" and that the nature and source of this income was concealed from the government (Gov. Br. 38-39, 55). Having thus at last committed himself to the proposition that Alprin, Koerner and Roer were in a conspiracy to impede Internal Revenue in the collection of their taxes, he seeks to show that the evidence connected Klein with this conspiracy.

The Formation of the June of 1946 Corporations

Although Klein had absolutely no motive of personal gain, he is nevertheless charged by the prosecutor as the master architect of a conspiracy to "hide" the income of the others; and this, indeed, at times without their understanding and even against their will.

First, it is said the "June-of-1946 corporations" were created at Klein's direction "to receive money from the Harwood's venture" (Gov. Br. 14). The very evidence referred to belies this statement: Alprin's testimony—the only competent proof other than Klein's as to the reason for forming these corporations—is that the Harwood enter-

prise in the United States was ending and that the companies were formed at Klein's suggestion (which Klein categorically denied) with the prospect that they might be appointed the "agencies through Central and South America for the distribution of Harwood" (IV, 2091).

The prosecutor then states "that Klein and his co-conspirators were plotting to use the June-of-1946 corporations as devices for not reporting some of the Harwood's income and for reporting some as a capital gain on the liquidation of the June-of-1946 corporations after a passage of years" (Gov. Br. 40). There is no proof of such "plotting". The fact is that Alprin, Koerner and Roer *did* report their "Harwood's income"; and when they reported it as a capital gain it was not on the basis that their "June-of-1946 corporations" had been liquidated, but on the claim that the drafts represented a profit from the sale of their stock in Tivoli—which, incidentally, was not a "June-of-1946 corporation" at all (G-89-a).

Whereas the indictment charges that this claim of Tivoli ownership was false and that the conspiracy was achieved by filing false returns, the suggestion is now made that the defendants conspired not to report their income at all, or if so, to report it on an altogether different capital gain theory. Thus, the prosecutor continues his improvisations as to the theories of guilt even on this appeal.

Indeed, still switch-theorizing, the prosecution attributes yet another purpose to the formation of these companies, namely, "preventing taxes on all the Harwood's profits over the years" and depriving the government of knowledge that the recipients of the drafts "had earned huge sums of money for work done on behalf of the Harwood's venture *in the United States*."[14] For, it is said, "activity in the United States" was a key to whether taxes were due "from the Harwood's entrepreneurs" (Gov. Br. 41). Such "activity", however, has no bearing on the *individual* tax liability of any defendant in the fifth count. The fallacy arises from the prosecutor's insistence on ignoring the distinction between the corporations and the individuals and the separate bases of corporate and personal tax liability.

[14] The prosecutor's emphasis.

The Transfer of Corporate Funds and Bonds to Canada

Next it is said that in August and early September 1946 "some of the profits" of the Harwood's venture were sent from the United States to Canada (Gov. Br. 16, 44). Since admittedly the venture had ended and the three Canadians had a three-quarter interest in the profits, it was not a suspicious circumstance that the profits were sent to Canada. Moreover, these were profits of decidedly *genuine corporations*, not profits belonging to Klein personally and, therefore, not affecting Klein's individual tax liability. Actually, as Klein testified without contradiction, upon receipt of the drafts representing the sales price of his interest amounting to $4,709,486.85 (G-356) on January 21, 1947 he deposited them in New York and Baltimore banks (III, 1512-13). *Klein thus returned to this country the profits upon which his individual tax liability to the United States depended and out of which, if necessary, the tax could be collected.*

As to the transfer of $8,000,000 in bonds to Canada on September 16, 1946 (Gov. Br. 16, 44), here again the bonds were not Klein's but those of genuine foreign corporations whose income taxes are not involved in the fifth count.[15]

The Reconciliation of the Corporate Books in March 1947

The charge is made that the original books of the Harwood corporations were destroyed or "disappeared" and an entirely new set "re-written"—*falsified*—in Montreal in March 1947 (Gov. Br. 20-21, 44). Indeed it is brashly stated that Rokoff "threw away the original Tivoli book of account" (Gov. Br. 42). This serious charge is purportedly based on testimony of Rokoff—a government witness—that he "might" have at some time rewritten parts of a book for neatness (I, 515-20, 522-23, 529-30, 564), and in disregard of his testimony that he never falsified a single entry (I, 570). The government's own proof showed that following the sale of Klein's interests the memorandum records of the Harwood companies kept in Baltimore were brought to Montreal so they could be brought into recon-

[15] The receipt and retention of this evidence was highly prejudicial. See discussion *infra*, pp. 43-45.

ciliation with the original books of account kept in Havana, which were also sent to Montreal; and all the books (save Tivoli's) were then turned over to the Canadians who by then owned the corporations outright (I, 555, 563-64). These books never again became available to Klein, not even in the preparation of his defense to this indictment, which was seriously handicapped by their unavailability (I, 52-53).[18]

Be that as it may, the entries in the Tivoli journal regarding the Alprin, Koerner and Roer drafts could not have been "re-written" or altered in March 1947, for the drafts were not issued until the 27th of that month. And the entries did not support, but contradicted the Alprin-Koerner-Roer version of Tivoli stock ownership, liquidating dividends and capital gains.

The Use and Holding of the Drafts

Klein's is the only competent testimony as to why drafts were used rather than checks. Alprin testified (as did Koerner and Roer before Internal Revenue) that he did not know why drafts were used or even why his and Koerner's were made payable to his Cuban corporation (I, 313-14, 316-18, 376-77; IV, 2172). But the government itself points out that Tivoli's bank account was closed by purchase of the drafts and transfer of the balance to Hannes (Gov. Br. 21-23). It was because Klein desired the immediate closing of the Tivoli account that, as he testified, drafts were used (III, 1525, 1701-02).

If there were any other purpose, the government has utterly failed to prove it. It could not have been to conceal Tivoli as the source of the income, for each draft was entered in the Tivoli book, which in turn was used by the prosecution as evidence of the alleged Alprin-Koerner-Roer conspiracy (G-380). And the use of a Tivoli check rather than a draft in the case of the Haas (Ribera) loan was wholly frustrative of that purpose (G-340).

This selection by Klein of drafts as a medium of payment does not fit in at all with the Alprin-Koerner-Roer

[18] Internal Revenue, however, had possession of photostatic copies of the books as early as May 1948 (*e. g.*, G-378).

version that Klein *required* them to hold their drafts against their will and despite their repeated importunities that he release them (I, 237, 239, 304-05, 313, 315, 320, 342, 376). By giving them drafts instead of checks Klein lost all control of the funds (I, 313-14, 310-18, 376-77). Their story, which the prosecutor stoops to sponsor, reduces itself to an absurdity. For according to them, although they could have used the drafts at once, and indeed badly wanted to do so, Klein forced them not to (I, 313, 315, 320, 342, 376). Thus, in effect, Klein is said to have compelled the others to hide *their* income from Internal Revenue without any perceptible advantage to himself. And Klein is said to have done this although the bank drafts, payable at New York in United States dollars, which he received in 1947 as his own share of the Harwood profits he immediately deposited in New York and Baltimore banks and revealed the receipt of their proceeds in his 1947 return!

If Klein was directing the holding of these drafts, the government cannot explain the "release" of the Haas check in 1949 (III, 1853-54), and the Roer draft in 1950 (I, 369-70) on the one hand, and on the other the continued "holding" of the Koerner and Alprin drafts (against their desires) until 1952 (I, 230-31, 324-25). How does this fit into the scheme to conceal income? And if Klein's was the directing genius, then why were the Roer and Alprin drafts deposited in banks, but Koerner's held in a vault?[17]

Again, while taking the definite position that the Alprin, Koerner and Roer drafts were, as Klein has always maintained, ordinary income and not, as they claim, capital gains, the prosecutor nevertheless chooses to adopt their "alibi" that it was Klein, not they, who wanted the drafts made payable to their Cuban corporations (Gov. Br. 22-23). Klein testified this was done at their request (I, 660-61; III, 1519-20). They stated, and the prosecution agrees: "It was Klein who wanted it that way" (Gov. Br. 23).

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[17] The government says Alprin held the Koerner draft "in his office safe where there were no records of the money—on the instructions of Klein" (Gov. Br. 44; and see *id.* at 26-27, 30). There is no evidence that Klein knew of or directed the keeping of this draft in Alprin's safe (see IV, 2179).

But nowhere is it shown why Klein "wanted it that way". By express concession of the prosecutor, Klein had no reversionary interest in the drafts (IV, 2577). His tax liability was not involved. What possible tax advantage could Klein obtain by making the drafts payable that way? None. They, not Klein, had reasons for asking, as he testified, that the drafts be made payable to their "June-of-1946 corporations", rather than to themselves.

The Prosecution's Misrepresentations of Klein's "Lies" to Treasury Officials

Ironically enough, in seeking to support its contention that Klein "lied" to Internal Revenue when he filed answers to certain interrogatories in 1949 and swore to them in 1951, the prosecution distorts the record.

Preliminarily, the government makes the misstatement that before Klein swore to his answers in 1951, "Roer had told Klein that he was going to report his draft as a liquidating dividend of Tivoli" (Gov. Br. 30). The prosecutor has the temerity to cite in support of this statement Klein's testimony, which completely contradicts the statement and also destroys the implication that in answering the interrogatories Klein conspired to protect Roer (I, 676; III, 1542).

This testimony shows that at the time of Roer's conversation with Klein in the "fall of 1951" (to which the government refers) Roer had already filed his return or that Klein believed he had done so (I, 678).

Moreover, in the very testimony cited by the prosecution Klein said that "sometime around the fall of 1951" Roer asked him for a letter from Tivoli stating that the Roer draft

> "* * * was the proceeds of a liquidation or partial liquidation, thereby resulting in Mr. Roer being able to obtain a capital gain.
>
> He was told by me that no such letter could be given, because it was not a fact, and I was not going to give him a letter stating such was the fact when it wasn't true" (I, 675-76).

When asked why he would not give Roer such a letter Klein answered:

> "He was not a stockholder in Tivoli Trading Company, and neither were Morris Alprin, nor Irving Koerner" (I, 676).

Thus, at the very time when in answering the interrogatories Klein was allegedly covering up for Roer (Gov. Br. 30, 31), Klein was in fact refusing to connive with Roer in deceiving Internal Revenue.

Moreover, in his answers to the interrogatories, made in 1949 and sworn to in 1951, Klein asserted that the stock of Tivoli was originally owned in four equal parts by the three Canadians and himself, and that he later became sole owner by acquisition of their shares (III, 1708-10). This was destructive of Roer's whole basis for claiming a capital gain through "sale" of his "Tivoli" stock (G-348, p. 244).

When the prosecution comes to deal with the interrogatories and their answers, it does so by excision (Gov. Br. 27-29, 46).

Of the more than sixty interrogatories submitted to Klein, only four concerned Tivoli drafts. These were:

> "60. What was the nature *and amount* [18] of the funds paid over by Tivoli Trading Company to Nancy Trading, Compania Comercial La Ribera, La Economica Agencias, Compania Exportadora Fernandina?
>
> 61. Who were the stockholders and/or beneficial owners of these companies?
>
> 62. What was the nature and amount of funds paid over by La Economica Agencias to La Importadora Marte and El Aguila Exportadora?
>
> 63. Who were the stockholders and/or beneficial owners of these companies?" (III, 1713.)

Klein answered:

> "Taxpayer is not in a position to answer *these four questions.*" (III, 1713.)

Only two of these four questions (60 and 61 or 63) are set forth in the government's brief and the important

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[18] In the government's brief (p. 27) interrogatory 60 is altered by omitting, without so signifying, the words "and amount" after the word "nature".

phrase "*these four questions*" is omitted from what is quoted by the prosecutor as Klein's response (Gov. Br. 27). The effect is grievously misleading.

In truth, Klein was not in a position to answer these four questions. He did not know who were the stockholders "and/or" beneficial owners of any of the companies named as recipients of the funds (III, 1717-18); nor did he know the nature and amount of funds paid over by La Economica Agencias to La Importadora Marte and El Aguila Exportadora. These funds represented the split-up in Toronto of Alprin's draft (paid to La Economica Agencias) with his two other Cuban corporations, about which Alprin admitted Klein knew nothing (I, 322-47; IV, 2212-13, 2176, 2233-34). Concededly, also, Klein had no interest whatever in any of the Cuban corporations formed by Alprin nor in the proceeds of the Alprin draft (IV, 2247-48).

Klein *did* know, of course, the nature and amount of the funds paid over by Tivoli to Nancy, La Ribera, La Economica Agencias and Fernandina. But Klein did not say *he did not know* the nature or amount of these funds. The very fact that the government asked the question showed that Internal Revenue knew that funds had been paid over by Tivoli to the named corporations. Hence, the only question which Klein could have answered, but did not, was the inquiry "What was the *nature* of the funds paid over * * *?"

Neither did Klein "lie", nor, as the government asserts, did he *admit* that he lied (Gov. Br. 46). Here again the prosecutor hacks the record by quoting only Klein's *interrupted answer* to one question. He deliberately omits Klein's answers immediately following: "*I wouldn't say I lied, sir * * * I just didn't answer it, sir*" (III, 1715).

Thus, the whole of the matter is that Klein, on advice of counsel, answered all of the 64 questions to which he knew the answers save one, and as to that one, which did not involve his taxes in any way, he merely refrained from answering.

Significantly, the interrogatories were answered in the course of settlement negotiations being conducted by the firm of McGuigan & Kilcullen, lawyers in good standing be-

fore this Bar, who have never been charged with conspiracy. These negotiations involved Klein's taxes, not those of Alprin, Koerner, Roer, Rosenberg or Haas (III, 1715, 1919-20). In this connection, it should be observed that the prosecutor's statement that the answers to the interrogatories were prepared "with the aid of Haas" (Gov. Br. 27) is just another half-truth.

Next, the prosecution claims that Klein "lied" about the stock ownership of Tivoli (Gov. Br. 28, 46). He did not lie, although the prosecutor, by grouping interrogatories and pieces of Klein's answers together, certainly makes it appear that he did. We shall consider the interrogatories and answers separately and in numerical order.

> "52. Q. When and in what manner did you acquire the stock of Tivoli Trading Company, giving details as to the consideration paid? A. Taxpayer acquired one-quarter of the stock of Tivoli on original subscriptions, paying about $713. *It acquired the remaining three-quarters of the stock set out in the answer to 44*" (III, 1708).

The italicized portion is deleted by the prosecutor and the answer to interrogatory 44 is not in the record.

In any event, the answer to interrogatory 52 is perfectly correct. When the Roer, Alprin, Koerner, etc. subscriptions totaling $2,850, were cancelled, Klein paid back $2,850. Since there were two qualifying shares held by Rosenberg and Klein at $1 par value, the total dollar amount of shares was $2,852. One-quarter, or $713, represented Klein's subscription; the balance covered the three-quarter interests of the three Canadians, who paid $713 each for their respective one-quarter participations (III, 1708-09).[19]

Interrogatory 53 and its answer are:

> "53. Q. Who were the other stockholders of Tivoli Trading Company? A. The other stockholders of Tivoli were I. J. Klein, A. L. McLennan and George W. Norgan" (III, 1709).

This answer is absolutely correct (III, 1475-77, 1486-87).

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[19] And see Klein main brief, 31-32.

Interrogatory 54 and its answer are:

> "54. Q. How did they a quire their stock and at what date, giving details as to the consideration paid? A. They acquired their interest on original subscription *in April 1945*, each paying the same consideration that the taxpayer did" (III, 1710).

Klein did testify, as the government states, that this answer was "a misstatement". He did not, however, give the reason which the government, by distortion of the record, ascribes to him, namely, "*because there was no subscription*" (Gov. Br. 28). What Klein really said was: "There was no subscription to the stock *in April of 1945*" (III, 1710).[20] In other words, the *date* of the subscription contained in the answer to interrogatory 54 was wrong. It should have been *November* 1945 (G-380; III, 1488-90, 1651-54, 1660).

Again, it is claimed that Klein "lied" regarding the location, at the time of the interrogatories (1949), of the Harwood "books of account" (Gov. Br. 29, 46). The interrogatory and answer are:

> "16. Q. Were duplicate books of account kept on any of these corporations, and, if so, on which ones, and where were they kept? A. All the books of account of the companies were maintained in the companies' office in Cuba. *That was a requirement of the Cuban law, and the Cuban officers of those companies would not have tolerated any other procedure*" (III, 1705).

Here, the italicized portion of Klein's answer has been snipped off by the prosecutor. The government claims the answer was false and asserts, without any record citation: "The books of account were actually maintained by Rokoff in Baltimore" (Gov. Br. 29). Yet the government itself elicited from Rokoff, whom it called as its own "hostile" witness, that the original books of account were

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[20] When Klein said: "That is a misstatement because there was no subscription", the trial prosecutor remarked, "I don't understand, Mr. Klein". Then Klein explained: "There was no subscription to the stock *in April of 1945*" (III, 1710).

maintained in Cuba and only "memorandum records" kept in Baltimore (I, 518). As Klein himself stated, when cross-examined about his answer to interrogatory 16: "Duplicate sets of books cannot be compared to memorandum books. I don't think Rokoff's books contained the information necessary for a complete set of books" (III, 1706).

Finally, the government claims that Klein "deliberately did not answer a question" as to "where the books and records of the foreign corporations were at the time of the interrogatories" (Gov. Br. 29, 46). It is true that apparently when asked "Where were those books kept, and where are they now located?" Klein answered "All the books of account were maintained in the company's office in Cuba", without stating where the books were *then* located (III, 1707). Nevertheless, in his answer to another interrogatory which the prosecutor studiously avoids mentioning, Klein stated he did not have the stock certificate books of Tivoli and added: "He assumes that they were sent from Cuba to Canada *along with the books of the other companies*" (III, 1710-11). Certified copies of these books had been obtained by Special Agent Victory on May 17, 1948 (G-378), one year before the interrogatories were answered and three years before they were verified.

The whole magnification of this molehill into a mountain indicates plainly how little evidence there really is of Klein's participation in the fifth count conspiracy. Reduced to final analysis, Klein neglected to answer but one of the more than sixty interrogatories submitted to him. He did not answer that one simply because it did not involve his own income tax liability (III, 1715). Surely, this omission in the circumstances is no evidence of a conspiracy to defraud Internal Revenue.

Internal Revenue never once complained that Klein's answers were unsatisfactory or evasive or false; nor did they ever insist upon fuller responses until they interrogated Klein orally about these very same matters in December of 1952. He then gave them complete and documented details regarding the nature, source and amounts of the various drafts to the so-called "June-of-1946 corporations".

Treasury never once resorted to its arsenal of weapons to compel answers to any interrogatories it deemed unanswered or to penalize Klein for any answers it considered false.[21] Not until the trial was he accused of having "lied" in answering any of the interrogatories. Even then, his answers were not alleged in the indictments or bill of particulars as parts or "means" of the fifth count conspiracy or even as overt acts in its furtherance. They were not introduced, though signed and sworn to, as part of the government's case. Only several were elicited on Klein's cross-examination under the guise of merely testing Klein's credibility. Yet now these are being used to forge the missing link necessary to connect Klein with the fifth count conspiracy.

The foregoing, with the exception of matters not relevant to the fifth count,[22] constitute the fundamental bases presented by the government's brief to associate Klein with that conspiracy.

The prosecutor has not even undertaken to rebut the arguments advanced in Klein's main brief (pp. 60-70) exposing the internal divergencies and contradictions of the government's attempt to unite Klein with the fifth count conspiracy.

If the government were not, for reasons of its own, bent upon convicting Klein of this conspiracy, it would never have prosecuted Klein in the first place. In the ordinary course of events, he would have been the prosecution's main witness as to the fifth count. In seeking to establish its major contention that the Alprin, Koerner and Roer drafts were ordinary income, *the government necessarily relies upon Klein for its proof*—the entries made by Rokoff at Klein's direction in the Tivoli journal; Klein's claims to Internal Revenue that Alprin, Koerner and Roer were never owners of Tivoli; Klein's cancellation of their subscriptions to Tivoli stock and his procurement, preservation and delivery to the Special Agents of the signed receipts of Alprin, Koerner and Roer acknowledging such

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[21] See Internal Revenue Code of 1939, §§ 3614(a), 3615 (b), 3616, 3631, 3632(a)(1), 3633, 3800; Balter, Fraud Under Federal Tax Law, Chaps. VI, VII (2 ed. 1953).

[22] See discussion *supra*, pp. 1-12.

cancellation and the refund of their subscription money; and Klein's testimony before Internal Revenue in 1952.

For the first time the prosecution now reveals its basic reliance on Klein by taking the same definite position as did the grand jury, that Alprin is chargeable with "false reporting of a capital gain which was ordinary income" (Gov. Br. 55). In stressing that the evidence overwhelmingly refuted Alprin's claim "that he owned stock of Tivoli and that the draft received from his June-of-1946 corporation was a liquidating dividend", the government says that "every single document in evidence, including an undated cancellation receipt signed by him, negates his 'ownership' of Tivoli" (Gov. Br. 47-48). So far as we know, every single one of these documents, including the cancellation receipt, emanated from Klein.

In fact, the independent proof in the case—part of the government's own evidence—corroborates Klein's erstwhile position as to the nature of the Alprin, Koerner and Roer drafts. Despite that fact this evidence continues to be purposefully ignored by the prosecutor.

Mr. Lawrence Gordon Baker still remains the government's forgotten man (see Klein main brief, 29-30). Although he was called as a prosecution witness, is completely disinterested, and is indeed one of the few witnesses whose testimony, in its entirety, remains in the record under the fifth count (I, 383-408; II, 1286), his testimony is treated in the government's brief, as it was in the prosecutor's summation, as an unmentionable abhorrence. Why this contemptuous silence? Is it because Mr. Baker's testimony so completely corroborates Klein's description of the drafts as "*commissions*" that it effectually removes Klein as a co-conspirator from the fifth count conspiracy?

It is a strange "conspiracy", to say the least, in which the conspirators are continually opposed, one against the others, and the others against the one.

POINT III

There Was a Radical Change in the Fifth Count at the Trial Resulting in a Fatal Variance Which Permitted the Jury to Convict Appellants of Several Separate Conspiracies Rather Than the Single Conspiracy for Which They Were Indicted.[23]

Despite the argument to the contrary in the government's brief (pp. 56-57), we do not contend that the prosecution must allege every "means" of a conspiracy or prove all the "means" alleged.

But we do contend that the prosecution may not, as it does here, allege a conspiracy to impede Internal Revenue by filing *false* returns and then reverse the charge in mid-trial and go to the jury on the theory that the identical conspiracy may be established even though the allegedly *false* returns are found to be *true*, or regardless of whether those returns be *true* or *false*. *United States* v. *Byers*, 73 F. 2d 419 (2 Cir. 1934), *Epstein* v. *United States*, 174 F. 2d 754 (6 Cir. 1949)[24] and *McMullen* v. *United States*, 96 F. 2d 574 (D. C. Cir. 1938)—discussed in Klein's main brief (pp. 56-60) and cavalierly ignored by the government—forbid such trickery.

The prosecution disclaims, however, that this masquerade of the indictment fooled the appellants. It says the "true theory of Count 5" was "laid bare" by the government before trial (Gov. Br. 57). We challenge anyone to find in the pre-trial proceedings any prefiguration, however indistinct, of the theories of guilt conceived at the trial. Actually, the government "laid bare" the theory of the fifth count by refusing to give defendants any particulars at all of the indictments except to specify the single respect in which it was claimed the Alprin, Koerner and Roer returns reported "certain net income as being subject to capital gain treatment for the purpose of concealing the nature and source of the income earned by the defendants"

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[23] In reply to government's Points 2 and 3 (Gov. Br. 56-72).

[24] This is not the same case as *Epstein* v. *United States*, 271 Fed. 282 (2 Cir. 1921) cited in the government's brief (p. 64).

in 1944 through 1947 (I, 83-84). The bill filed by the prosecutor "laid bare" only a portion of each return and stated that such portion was "alleged in Count Five to be *false*" (I, 128-29).

Judge Palmieri held that by this "disclosure", such as it was, the defendants had "obtained all the information to which they [were] properly entitled", although he noted the purpose of a bill is "to obviate surprise at a trial and enable the defendant to prepare his defense". 124 F. Supp. 476, 479.

Now the prosecutor informs us that in giving even this measly information the "Government was only particularizing *one* of the 'means' and confining itself *on that 'means'* to charging that only parts of the Alprin, Roer and Koerner returns were false" (Gov. Br. 59). If this be true, then the bill of particulars, we submit, was not merely insufficient but a misleading entrapment, and the denial of appellants' demands for further particulars of the means by which the asserted fraud had been perpetrated was an abuse of discretion warranting reversal (I, 38, 45, 47, 51-52, 55, 83-84). *McMullen* v. *United States*, 96 F. 2d 574 (D. C. Cir. 1938).

But appellants' position is not based merely on surprise. Far more deeply involved is their constitutional right to be tried on the indictment filed by the grand jury, not as amended by a trial court, nor on charges improvised by a prosecutor in the course of trial. Here, what began as a one-conspiracy case was so presented as to permit the jury to find appellants severally guilty of at least three distinct conspiracies, and perhaps even five.

The prosecution is forced to admit that the trial judge "in passing on the motions to dismiss at the end of the Government's case hypothecated *three inferences* which the jury could make from the evidence of the bank drafts which were paid Koerner, Alprin and Roer from Tivoli". But, telling less than half the truth in this instance, he states not once but twice that these hypotheses were never "*read* to the jury" (Gov. Br. 64, 68). Therefore, he says, "While the Government submits that the Court's inferences were correct, *they need not have been*" (Gov. Br. 68). Thus, the false impression is given that these three

hypotheses were never given the jury; and that, even if incorrect, they could not have affected the verdict.

That Judge Sugarman's hypotheses were "not read" to the jury is literally true. But the prosecutor conceals the fact that those three hypotheses (139 F. Supp. at 141-42) *were repeated almost verbatim* by the prosecutor in his summation and were substantially adhered to by the judge in his charge (II, 802-05; IV, 2528-29, 2573-75).

That there may be no mistake about this, we set forth in parallel columns in the Appendix to this Reply Brief (p. 53, *infra*) the pertinent excerpts from (1) Judge Sugarman's opinion denying acquittal on the fifth count; (2) the government's summation and (3) the trial court's charge (II, 802-05; IV, 2528-29, 2573-75).

The question is not whether, as possible *inferences from the evidence*, these hypotheses "were correct". The vital consideration is: Were they sufficiently alleged in the indictments, as limited by the bill of particulars?

The theories of guilt thus evolved permitted the jury to find (1) a conspiracy between Klein and Rokoff, to which Alprin, Koerner and Roer were not parties, to impede Internal Revenue by mislabeling the three drafts as "commissions paid" in the Tivoli books instead of correctly entering them as liquidating stock dividends; (2) a conspiracy between Koerner, Alprin and Roer, to which Klein and Rokoff were not parties, to impede Internal Revenue by falsely declaring the drafts as the capital gain proceeds of liquidating dividends, instead of truly reporting them as ordinary income; (3) a conspiracy, to which all the appellants were parties, to "impede" Internal Revenue by holding the drafts until Klein might clear up his "tax difficulties"; (4) a conspiracy between Klein and Rokoff, to which none of the other defendants was a party, to mislabel the $35,000 Tivoli check to La Ribera as a "commission paid" when in fact it was "a loan"; and (5) a conspiracy between Klein and Haas and his partners, Schlessinger and Mayers, to which the other defendants were not parties, to misreport in Haas' income tax return the $35,000 La Ribera check as a capital gain instead of as ordinary income.

The government contends this is but a "fragmentation of the proof" by the appellants (Gov. Br. 67). Rather it is

a fracturing of the indictment by the prosecution. The indictment charged one and only one conspiracy to which defendants and their co-conspirators were said to be parties. But the trial judge, with the concurrence of the prosecutor, splintered the indictment so that the jury could select from a number of suggested combinations of inferences to convict all the defendants, even though it found some of them were not parties to the single conspiracy for which they were indicted.

The "Rokoff-Klein conspiracy" was not the conspiracy charged in the indictment. Apart from the fact that it involved Klein and Rokoff only, it obviously was not a conspiracy to conceal the nature and source of income. It could not conceal Klein's income because the drafts admittedly were not income to Klein (IV, 2577). Nor did it conceal the nature and source of income to Alprin, Koerner and Roer. For the entry of the drafts as "commissions" identified them as ordinary income—just what they were claimed to be by the government in its bill of particulars. And since the supposed Rokoff-Klein conspiracy involved entries of the drafts in the Tivoli ledger, their source—Tivoli—was not concealed but disclosed.

While the second conspiracy listed above was in fact charged in the indictments, the proof does not connect Klein to it (see pp. 22-35, *supra*). Klein's connection with the third or "holding" conspiracy rests entirely upon the inadmissible Roer statement to Internal Revenue (see pp. 12-22, *supra*).

The "La Ribera conspiracy" was not the conspiracy charged in the indictment either. If it was a conspiracy at all, it could only have been between Klein and Haas and perhaps Rokoff, with which Alprin was not connected. The injection of this conspiracy into the case was particularly prejudicial in view of the fact that if it ever existed it ended with the filing in 1950 of Haas' 1949 income tax return and was barred by the three-year statute of limitations. 18 U. S. C. § 3282; *United States* v. *Siebricht*, 59 F. 2d 976 (2 Cir. 1932).

The government, however, argues that "the true nature and source of the La Ribera payment forms a conspicuous part" of the conspiracy to defraud by means of hiding the nature and source of the defendants' income. Indeed, the

La Ribera payment is said to be only "a part of one of the 'means' in the case" (Gov. Br. 69).

If this be true, then the indictment and bill of particulars in this case are a shocking example of misleading concealment. The La Ribera transaction is not even mentioned in either document. Haas' income tax return declaring the La Ribera payment as a capital gain is not alleged to be false nor is its filing asserted as a part or means of the conspiracy. The Haas return was not put in evidence. Neither the La Ribera payment, nor the holding of the Tivoli check, nor its deposit in Canada, nor its treatment in Tivoli's books, are alleged as overt acts. In the face of this sphinx-like silence, to confront appellants with the La Ribera transaction at the trial and then to make it, *ex post facto*, an important "part of the conspiracy" or "part of" the "means" for its achievement is, we submit, a flagrant denial of due process.

It is argued that, since the indictment alleged generally as part of the conspiracy that defendants would conceal the nature and source of their income and that false entries would be made in the Tivoli ledger, this gave fair "warning" that La Ribera was included in the charges. Reference is made to the subpoena served on The Royal Bank of Canada July 15, 1947 (EP) which "sought information about La Ribera"; the questioning of Haas and Klein about La Ribera in 1952 by the Special Agents; it is said that since the Count 5 conspiracy allegedly began in June, 1946 and the La Ribera transaction occurred in January, 1947, appellants could "scarcely" have been "left in doubt" about La Ribera being in the case; and that defense counsel on the eve of trial had stipulated the genuineness (*but not the relevancy*) of La Ribera records. These circumstances, the argument runs, show appellants were not surprised when La Ribera was thrust upon them at the trial (Gov. Br. 70-71).

But the very fact that Treasury had been probing La Ribera since 1947 and yet no mention of La Ribera was made in the indictments or bill of particulars surely justified appellants in concluding it was not regarded as part of the alleged conspiracy. This belief was further confirmed by the fact that the only overt act charged against

Haas in the indictments was that "on or about February 1, 1949 * * * [he] had in his possession $500,000 in cash" (I, 145)—a matter wholly unrelated to the La Ribera transaction. And to this very day neither Haas nor La Ribera has been indicted for filing a false return or evading or attempting to evade income taxes for 1949 or any other year.

This, then, was not the type of situation dealt with in *United States* v. *Rowe*, 56 F. 2d 747, 749 (2 Cir. 1932) where this Court treated the variance as one which did not "mislead the defense". Even there it was noted that while "*strict* correspondence between pleading and proof is not required" nevertheless "defendants are entitled to a *true statement of the agreement* [conspiracy]."

Even assuming the "Klein-Rokoff conspiracy" and the "La Ribera conspiracy" could correctly be found to be but parts of the single conspiracy charged in the indictment, the case was not properly presented to the jury. "Whether the proofs establish the conspiracy alleged by an indictment or establish several conspiracies not alleged may * * * be * * * a question of fact for the jury". But the question must be presented with "instructions which [are] clear, direct and adequate * * * ". *Lefco* v. *United States*, 74 F. 2d 66, 69 (3 Cir. 1934). Here no such instructions were given. The jury, it is true, were told that the indictment charged a single conspiracy (IV, 2568-69). They were not explicitly advised, however, that they could not find any one of the appellants guilty of any conspiracy other than the one charged in the indictment.[25] On the contrary, as we have seen, they were permitted by the charge to return a verdict of guilty against all the defendants even though they found one or more of them guilty of a conspiracy to which the others were not parties.

The prosecution nevertheless asserts that if the evidence supports the inference of a single conspiracy and

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[25] This is the more remarkable in view of the trial court's statement earlier in the trial:

> "* * * I intend to instruct the jury that if they were to find any conspiracy other than the conspiracy charged in the fifth count they can't convict. It must be narrowly that conspiracy and that conspiracy alone" (II, 1232).

the judge charges the jury that it must find that single conspiracy, the conviction stands no matter how many other crimes could have been charged or proved by the same evidence (Gov. Br. 67). The very cases cited hold otherwise.

Thus, in *Blumenthal* v. *United States*, 332 U. S. 539, 542 (1947), the court stated that the crucial question was whether

> "* * * the proof, in variance from the indictment, shows that there was more than one conspiracy."

Significantly, there the government *conceded* "that prejudice [had] resulted if more than one conspiracy has been proved"; but insisted that "the evidence establishes a single conspiracy and no more" (*id.* at 548).

In *United States* v. *Weinberg*, 226 F. 2d 161 (3 Cir. 1955), cert. denied, 350 U. S. 933 (1956), the trial court gave precautionary instructions to the jury which should have been given here:

> "The court in its charge confined the crime of the defendants to conspiring with each other. *Conspiracy by either defendant with any of the other three persons named as conspirators in the indictment was eliminated*" (226 F. 2d at 172).

In *Wyatt* v. *United States*, 23 F. 2d 791, 792 (3 Cir. 1928), cert. denied, 277 U. S. 588 (1928), it was expressly stated:

> "When, as here, one large conspiracy is specifically charged proof of different and disconnected smaller ones will not sustain conviction; nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction."

Contrary to the government's contention, when the evidence permits a jury to find defendants guilty of *both* the conspiracy charged and a conspiracy not charged there is a fatal variance requiring reversal of the conviction. This is the express holding of *Terry* v. *United States*, 7 F. 2d 28 (9 Cir. 1925), cited in Klein's main brief at 52.

Here, as in *United States* v. *Siebricht*, 59 F. 2d 976, 978 (2 Cir. 1932), the trial court erroneously left it to the jury to find a single conspiracy in the face of proof of more

than one conspiracy under an indictment alleging a single one.

Since the general verdict of guilty does not disclose whether the jury convicted on the conspiracy charged or on other conspiracies not charged, the conviction should be reversed. *Malaga v. United States*, 57 F. 2d 822, 826 (1 Cir. 1932).

POINT IV

The Evidence Referred to in Klein's Point IV and Government's Point 10 Was Erroneously Admitted. The Stricken Evidence Referred to by the Government Is Not Properly Before the Court.

It is contended repeatedly that because Klein did not object when certain evidence was originally received or specify on which counts the evidence was inadmissible, he may not claim error in the later refusal to strike (*e.g.*, Gov. Br. 97-98). During the month-long striking out process the prosecution never once made this objection (II, 810-1226). The government elsewhere candidly states that earlier in the trial "most of the attention was focused on the first four counts" (Gov. Br. 60). After the acquittals were granted on those counts, all the evidence was re-examined *de novo* as if it were then being offered for the first time on the fifth count (T. R. 6133).[26] In view of this, the government's present position is as startling as it is untenable.

The Transfer of the Harwood Corporations' Bonds to Canada

(Gov. Br. 98-103)

Giving the prosecution the benefit of every permissible inference, the heart of the matter is this: After The Royal

[26] Appellants made and the court ruled on motions to strike evidence not originally received against them, or received without their objection, or with their consent, or even originally introduced by them (*e. g.*, T. R. 439-41, 6102-06, 6118-21). So too, the prosecutor moved that evidence at first received as to only one defendant be taken as to all, or earlier offered against a former defendant be retained as to the defendants on trial (II, 846-51).

Bank of Canada was served on September 16, 1946 with an *OPA subpoena* to produce records pertaining to accounts of the Harwood corporations and Holohan of that bank had so advised Klein, $8,347,000 in bonds *belonging to the corporations* were, at Klein's direction, sent from the New York to the Montreal Agency of The Royal Bank of Canada.

Since the bonds admittedly did not belong to the *individuals* named as defendants in the fifth count but to *corporations* which the trial court had conclusively held to be genuine (139 F. Supp. 135), and 75% of whose stock was owned by Canadians, the transfer was entirely natural and obviously had no bearing upon collection or even ascertainment of the *individual* income taxes of the fifth count defendants.

This would be so even had the transfer followed an Internal Revenue subpoena. *A fortiori*, it is true since the subpoena came from OPA. For, as the government's brief states (inconsistently but correctly) in another connection:

> "The tax collectors, not OPA officials, are concerned with what is ordinary income and what is capital gain and what must be reported and what must not be reported" (Gov. Br. 96).[27]

Realizing the irrelevancy of this evidence, the prosecution deliberately concealed the important fact that this was an *OPA* and not an *Internal Revenue* subpoena and shifted to Klein the burden of showing the true nature of the document.[28]

It is true, as the government says, that the trial court struck Holohan's testimony that he told Klein "a document" had been served on the bank. Nevertheless this left the prosecutor still free to contend, as he did in summation and does now in his brief, that the September 1946 bond transfer was in furtherance of the alleged June 1, 1946

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[27] By this very same reasoning the trial judge struck testimony that Klein in the Fall of 1946 had refused to tell an OPA investigator where he filed his income tax returns (II, 1057-63); and early in the case he excluded as irrelevant and grossly prejudicial the prosecutor's offer of "proof" of alleged OPA fraud. 131 F. Supp. 807.

[28] Although the government knew well in advance of trial that this was an OPA subpoena (III, 1437-38, 1441-47), the prosecutor in

conspiracy to impede the collection of taxes (IV, 2483-86). Thus, the onus was foisted on Klein to show what the prosecutors had all along avoided disclosing and now only casually admit, namely, that the document was in fact "an OPA request subpoena" and that this was what Holohan had telephoned Klein immediately before the bond transfer (Gov. Br. 101).[29]

Once this fact was unearthed all evidence regarding the transfer of the bonds should have been stricken. Permitting it to remain and allowing the jury to consider it, as the trial judge did, "in determining the guilt or innocence of the defendants of the crime charged in the fifth count" (IV, 2580) was reversible error.

The $3,000,000 Exchange

(Gov. Br. 103-05)

The government justifies the retention of this item in evidence as showing that "Klein juggled figures among his corporations"; and as impeaching Rokoff's testimony that he might rewrite "pages" in books if they weren't "neat" (Gov. Br. 104-05).

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opening gave the impression that the "full scale investigation" in the "middle of 1946" was an Internal Revenue inquiry and described the bond transfer "in the fall of 1946" as a flight of capital "for the purpose of evasion of income taxes" (I, 167-68). In opposing acquittal at the end of the government's case, the prosecutor in his oral argument and brief did not reveal the OPA character of the subpoena (II, 750-51), nor did he disclose it in the argument of the motions to strike Holohan's testimony (II, 1039-45).

[29] Indeed, it is admitted that Holohan was first shown the subpoena in preparation for his reappearance as a government "rebuttal" witness (Gov. Br. 101).

There is a most unfair implication in the government's statement that the subpoena was "found" in "the office files of Klein's former attorneys" (Gov. Br. 101). The attorneys were Root, Clark (now Dewey, Ballantine); and while they were representing Ramsey Scott when the subpoena was served, they were then also counsel to the Royal Bank and were consulted by the bank regarding the subpoena. They later held it in their files *as the bank's attorneys, not Klein's* (I, 414-16; IV, 2276-77).

To say the purpose of showing the $3,000,000 entry was merely to impeach Rokoff's testimony that he would sometimes rewrite pages of books for neatness, is less than frank. The purpose plainly was to imply something sinister in the way this $3,000,000 item was treated on the corporate books (I, 534-39). However, the transaction involved funds of foreign corporations in foreign banks not subject to United States taxes, and no connection, however remote, was shown between these entries and the personal income taxes of the appellants. [30]

Miscellaneous Bank Transactions

(Gov. Br. 105-07)

These transactions are said to show Klein sent "profits *of the corporations* to Canada" (Gov. Br. 106). What of it? The corporations have been conclusively found genuine; *their* taxes are not involved and 75% of their stock was owned by Canadians.

It is also said "these funds were turned into bank drafts and were held as such for a period of time" (Gov. Br. 106). Again, what of that? Actually, the very records referred to show the drafts were not *Klein's* but *corporate* drafts; and they were held at longest for *two* weeks (G-286; G-288; G-290; G-308).

But, it is argued, "Klein's holding of his Harwood's profits in the form of bank drafts was a circumstance which the jury could consider on the question of whether the later use of bank drafts by Alprin, Koerner, Roer and the rest was mere accident or the result of a plan devised by Klein" (Gov. Br. 106). The drafts referred to were not "Klein's Harwood's profits". They were, we repeat, drafts belonging to *corporations, not to Klein.* And Klein's Harwood's

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[30] As appears on the face of the Cameron Stuart book (G-378), Special Agent Victory, one of Revenue's leading investigators, obtained a certified copy of the book as early as May 17, 1948. Yet, Mr. Victory was not called, nor were any of the other government investigators, to show any connection between this $3,000,000 item and the fifth count conspiracy.

profits were paid him by checks deposited in New York and Baltimore banks (III, 1512-13). There was thus no similarity whatever between the disparate dispositions made of Klein's profits and the "profits" of Alprin, Koerner, Roer and Haas.

Finally, the government says this irrelevant hodgepodge of bank records could not have prejudiced appellants because the jury's attention was not specifically directed to it in the prosecutor's summation (Gov. Br. 106-07). But, surely, in a criminal appeal the prosecution is not entitled to the benefit of a guess that evidence improperly received and retained at the prosecutor's insistence may possibly have been disregarded by the jury.[31]

The Hannes Bank Records

(Gov. Br. 107-09)

The Hannes bank records are claimed to be relevant because they show Hannes purchased drafts which were held from March 1950 to November 1953. The prosecution made no attempt to prove why these drafts were bought or held, the use of their proceeds, or that they had any connection with Klein's taxes. Klein was asked nothing about them either when questioned by Internal Revenue or when cross-examined at the trial. The inference now drawn, that the *holding* of the Hannes drafts by Klein is "proof" that Alprin, Koerner and Roer held their drafts at Klein's directions (Gov. Br. 108) is completely inconsequent and a palpable afterthought.

Next it is said the Hannes account indicates Klein's statement in the rider to his 1947 return that Hannes assumed $800,000 of contingent liabilities from Tivoli is false because the records do not show these liabilities were paid. But the rider itself stated the liabilities had not been paid

[31] The jury were shown the records as they went into evidence, and they were summarized for the jury after disposition of the motions to strike (III, 1381-1413).

and were "contingent"—not absolute. Moreover, Klein's return was not claimed to be false in this respect, nor was its filing alleged to be part of the fifth count conspiracy. The trial court repeatedly tried to make this clear to the prosecutor (III, 1634-35; IV, 2517) and so charged the jury (IV, 2569).

The government also suggests that since Haas was an officer-director of Hannes (for one-half hour) and Hannes held one directors' meeting at the same time and place as La Ribera, Hannes' bank accounts were "good evidence of concerted activity" (Gov. Br. 108). This "reasoning" is really so specious it defeats itself.

Finally, the prosecutors resort to the generality that "the story of the Harwood's venture would not be complete without evidence of what happened to all of its profits" (Gov. Br. 108-09). This was irrelevant to the fifth count. Under the first four counts the government proved the Harwood profits were made by the Harwood corporations and that on sale of his corporate stock Klein realized a personal profit correctly reported as a capital gain. 139 F. Supp. 135.

The Halperin, Haas and Burke Opinions

(Gov. Br. 109-12)

The prosecution charges that "Klein lied on the witness stand when he said that the Halperin opinion had nothing to do with the Harwood's deal" (Gov. Br. 111). Yet, the opinion itself shows that Klein told the truth. Dated March 3, 1944 (G-21), it considered the tax liability of a Cuban corporation to be formed by three American citizens and one resident alien to buy Canadian liquor stocks and resell them through agents in the United States. Agencias Destiladores and its successor, Ramsey Scott, were not formed by three American citizens and one resident alien, but by three Canadian citizens and one native born American citizen. Ostrow, to whom the Halperin opinion was forwarded

by H. H. Klein at the instance of I. J. Klein, was never shown to have had anything whatever to do with the Harwood enterprise.[32]

The government says the Halperin opinion "warned Klein that foreign corporations could be taxed on United States activity and that in some instances the Internal Revenue Code would not recognize the acquisition of corporations as a means of avoiding taxes" (Gov. Br. 109). But, again, this had relevancy only to the first four counts, on which appellants were acquitted. All who were asked for tax opinions—Halperin, Haas and Burke—were requested to advise regarding *corporate* tax liability. Not one was asked an opinion regarding the *personal income tax liability* of the individual defendants named in the fifth count.

Again, the prosecution claims these opinions "showed tax-consciousness by Klein, by Haas, and by Alprin", and

---

[32] The statement that the Halperin opinion was "received by" Klein is true only to the extent that it was physically handed to him for transmittal to Ostrow by I. J. Klein to whom the opinion was addressed (G-21).

The prosecution horribly distorts the record in stating that before Haas rendered his first opinion Klein and Alprin discussed "either the Halperin opinion * * * or something very similar to it * * *" (Gov. Br. 109-10). Alprin did not so testify at the place cited (IV, 2140-41), or at any other point. Alprin, speaking of Klein, testified:

> "He said he had a tax opinion but wanted mine * * *. The substance was that he had an opinion."

Pressed as to what opinion Klein referred to, and specifically if it was the Halperin opinion, Alprin responded:

> "*No, sir, I never heard that name before. I heard it for the first time in this courtroom.*"

Urged further by the prosecutor to identify the opinion, Alprin testified:

> "I have a hazy recollection that he said he had an opinion *in Baltimore or from Baltimore*" (IV, 2140-41).

Admittedly, it was Burke who practiced in Baltimore (G-359), not Halperin, who practiced at 170 Broadway, New York City (G-21).

that Klein was "worried about taxes" (Gov. Br. 110). We repeat: What of it? Heaven forbid that "tax-consciousness" become a crime! Moreover, Haas and Alprin were conscious of *corporate*, not individual income taxes. Indeed, they were not tax-conscious at all in a criminal sense —no more so than Burke or Halperin, who were neither indicted nor charged as co-conspirators.

The prosecutors insist that appellants were concerned that "the paper Harwood's corporations" should not be "found to be sham for income tax purposes", and were concerned "for paper appearances" (Gov. Br. 111-12). If there were such concern, it was surely a well-advised one. In any event, the acquittal on the first four counts—the acquittal which the prosecution tries so desperately to forget—establishes that the Harwood corporations were not mere "paper appearances", but real, and that their taxes and not those of appellants were treated in the Halperin, Haas and Burke opinions, which therefore have no relevancy to the fifth count.

POINT V

Appellants' Omission to Move for a Mistrial Does Not Preclude Reversal of Their Conviction Because of Invincible Prejudice from the Stricken Evidence.[33]

The proof received before acquittal on the first four counts and thereafter stricken as irrelevant to the fifth created a jury prejudice that nothing could overcome. The heavy reliance by the prosecution on the stricken evidence in its brief on this appeal confirms the prejudicial nature of this evidence and proves how essential it must have been to the jury verdict on the fifth count. Had appellants sought a mistrial, we have no doubt its denial

[33] Replying to government's Point II (Gov. Br. 112-117).

would have been reversible error. See Klein main brief, 91-103.[34]

In these circumstances is appellants' omission to move for a mistrial, as the prosecution contends, fatal? We assert it is not. It was so held in *Pierce* v. *United States*, 86 F. 2d 949, 953, 954 (6 Cir. 1936) where it was said:

> "Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the government itself be there a litigant. * * * Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error."[35]

The *Pierce* case was followed in *Snipes* v. *United States*, 230 F. 2d 165 (6 Cir. 1956), where it was discovered after the jury had retired but before verdict that a prosecution rebuttal witness had committed perjury. The trial court told the jury this testimony was false and to disregard it. The question presented on appeal was "whether the prejudice thus created was eliminated from the minds of the jurors by the supplemental direction of the Court, *in view of the fact that no mistrial was sought on that ground until after the guilty verdict, by motion for new trial*" (*id.* at 167).[36] The stricken testimony having created "an

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[34] If the Court agrees with the prosecution that Klein's discussion of this prejudicial evidence is merely a "nebulous attack" (Gov. Br. 114), there is nothing more to be said.

The prosecutor assumes the stricken proof was all relevant to the first four counts and from this assumption argues that its irrelevancy to the fifth count should be overlooked (Gov. Br. 114). But even assuming the evidence was not improperly received in the first instance, this does not alter the case. See *Brown* v. *United States*, 22 F. 2d 293 (7 Cir. 1927); *Miranda* v. *United States*, 196 F. 2d 408 (9 Cir. 1952), cert. denied, 344 U. S. 842 (1952); cf. *Marzani* v. *United States*, 168 F. 2d 133, 138 (D. C. Cir. 1948), affirmed by an equally divided court, 335 U. S. 895 (1948).

[35] The court quoted *N. Y. Central R. R. Co.* v. *Johnson*, 279 U. S. 310 (1929), cited in Klein's main brief at 100.

[36] The procedure in the *Snipes* case was followed here (IV. 2612-13, 2675-76).

atmosphere of guilt that could not be dispelled by any corrective ruling of the Court, short of mistrial", the conviction was reversed and a new trial granted (*ibid.*).

Here, as the trial judge himself noted on several occasions (II, 837, 966, 979), the irrelevant evidence simply could not be erased from the jurors' minds (and see, Gov. App. 12a). As the verdict shows, the resulting prejudice could be remedied only by a mistrial or its equivalent, *i.e.*, granting appellants' motion for a new trial after verdict. Denial of that motion constitutes reversible error.

We made no motion for a mistrial as we realized that, if granted, a new trial would subject the defendant Klein to another protracted and expensive trial, which might have been avoided if the jury had not been completely misled by the errors referred to in this and in our main brief.

CONCLUSION

The judgment of conviction of appellant Hyman Harvey Klein should be reversed and a judgment of acquittal entered as to him; or, in the alternative, he should be granted a new trial.

Dated: New York, N. Y.,
May 9, 1957.

Respectfully submitted,

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APPENDIX

Comparison of (1) Trial Court's Opinion Denying Acquittal on Fifth Count; (2) Prosecutor's Summation and (3) Trial Court's Charge, Showing How Altered Theory of Guilt Was Presented to the Jury [in Answer to Repeated Statements in Government's Brief That the Trial Court's Three Hypotheses of Guilt *"Were Never Read to the Jury"* (Gov. Br. 64, 68)]

Judge Sugarman's Opinion Refusing to Acquit on Fifth Count (II, 802-05)

"* * * on the record in its present state * * * three hypotheses present themselves:—(1) The funds were a liquidating dividend due Koerner, Alprin and Roer for their stock in Tivoli; (2) additional income by way of commissions, bonus or even a gift to Koerner, Alprin and Roer for their services in bringing about the success of the Harwood venture and (3) they were neither.

As to the first:—a reasonable person could conclude on the record that these funds were a liquidating dividend as claimed by Koerner, Alprin and Roer. If that is so, then at least defendant Klein and the co-conspirator Rokoff conspired to label these funds in the books of Tivoli falsely; i.e., as commissions.

However, a reasonable person could conclude on the record in its present state the second hypothesis:—that these funds were not a liquidating dividend but were additional ordinary income paid to Koerner, Alprin and Roer for their services in the Harwood deal. In that event it would appear that the defendant Alprin at least fraudulently stated, as did Koerner and Roer, that these funds were other than ordinary income when Roer filed his return in 1950 and Koerner and Alprin filed theirs in 1952. Such finding is not in my view limited to a conspiracy between defendant Alprin and co-conspirator Koerner. * * * it might be reasonably concluded on the record as it now stands that the misbranding of these funds in the 1950 Roer return and the 1952 Koerner and Alprin returns was the product of a combine of the seven named defendants and the three named co-conspirators.

Prosecutor's Summation (IV, 2528-29)

"In turning that question [whether in fact a conspiracy existed to impede the Revenue Service] over in your mind, there are three hypotheses or three ways of looking at this thing: You can find that these funds were a liquidating dividend due Koerner, Alprin and Roer. If you come to that conclusion, you can find that Klein and Rokoff, the co-conspirator, conspired to mislabel the books of Tivoli by calling them accrued commissions and expenses.

Or you can find that the funds were ordinary income, that they were no liquidating dividend, and that all the defendants were engaged in a conspiracy to misbrand the funds in Roer's 1950 return, in Koerner's 1952 return and in Alprin's 1952 return.

Trial Court's Charge (IV, 2573-75)

"On the other hand, you might find that it was, as claimed by Alprin, Koerner and Roer, a liquidating dividend on the dissolution of Tivoli Trading Co., despite the fact that Alprin, Koerner and Roer might have prior thereto surrendered their subscriptions to shares of stock in that corporation.

You could find that Alprin and Koerner and Roer were entitled to their respective shares of the syndicate's earnings by reason of their activities during the years when the whiskey selling venture was in operation. You could find that the sum of more than a quarter of a million dollars received by each of Alprin, Koerner and Roer was, as claimed by Klein, a bonus and hence ordinary income to the recipients of the proceeds of those drafts or, possibly, a gift.

Finally, on the record in its present state, a reasonable person could conclude that it was neither a liquidating dividend nor income to Koerner, Alprin or Roer. It must be remembered that these drafts were procured at a time when Klein was in income tax difficulties. * * * [this] might lead to the rational conclusion that a purpose other than that claimed by either side of the dispute as to the character of this money was the fact and that it was to be given the appearance of a legitimate expenditure by Tivoli until the conclusion of Klein's then income tax difficulties after which it would be disposed of in some manner to be agreed upon by the parties. If so, all defendants named in the count could well be found to have participated in a conspiracy to thus throw sand in the Government's eyes in the performance of its functions respecting income taxes."

Or you can find that this was neither a liquidating dividend nor income to Koerner, Alprin and Roer, because it might have been given to them for a purpose other than that claimed by either side to this controversy, and that it was to be given the appearance of a legitimate expenditure until the conclusion of Klein's income tax difficulties after which it would be disposed of in some manner to be determined by the parties."

But in spite of which of those inconsistent claims you might find to be true, you could find that the manner of handling the payment of those sums was part of an overall plan by the defendants and co-conspirators to conceal from the United States Treasury Department the facts, whatever they were, so that the true income tax liability, if any, of the defendants might not be ascertained.

You could also find that at the time when the drafts were delivered to Alprin and Roer they were either a liquidating dividend or compensation or a gift, but with a condition attached. You could find that there was an understanding that they were to be held pending the determination of the tax consequences of the syndicate's operations. It might be found that it was agreed that Alprin, Koerner and Roer were not to receive their liquidating dividend or compensation for services or gift until the tax, if any, to be assessed against Hyman Harvey Klein or his corporations or his three Canadian co-venturers and him, on the income resulting from the whiskey selling venture, was determined. You might find that it was agreed that the tax on these one-quarter million dollar payments, if paid by Klein and his associates was to be apportioned against these payments and Klein was to be reimbursed therefor."

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FILE
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JOHN T. FEY,

No. 593

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v—

HYMAN HARVEY KLEIN, MAURICE HAAS, and MORRIS O. ALPRIN,

Defendants-Appellants,

and

ISIDOR J. KLEIN, ALBERT McLENNAN, GEORGE NORGAN, ELLIS ROSENBERG, IRVING A. KOERNER and ALBERT ROER,

Defendants.

APPENDIX FOR UNITED STATES OF AMERICA

PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York,
Attorney for the United States of America.

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I

The Procedure on the Admission of Evidence

April 12, 1955

• • • •

(193) • • •

JULES JACOBS, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Bauman:

Q. Mr. Jacobs, will you speak up loudly enough for me to hear you where I am standing now and in that way every one in the jury box will be able to hear you, too. What is your business or occupation, sir? A. I am an attorney.

Q. And where is your office? A. At 350 Fifth Avenue.

Q. Here in New York City? A. New York City.

Q. And have you been affiliated at all with R. C. Williams & Company? A. Yes.

Q. For how long have you been affiliated with that company? A. Since 1939.

Q. In what capacity? A. As counsel and director.

Q. Now, are you also a member of the executive committee of that corporation? A. Yes.

Q. How long have you been a member of that executive committee? A. Oh, for about, I'd say for (194) about eight years.

Q. Do you know the defendant Morris Alprin? A. Yes.

Q. Will you look around the court room, please, and see if you can point him out? A. The gentleman sitting right at the end of the room (indicating).

Mr. Bauman: May the record indicate that the witness has identified the defendant Morris Alprin.

Q. Do you know the defendant Irving Koerner? A. Yes.
Q. Would you point him out, please? A. Second from the aisle (indicating).

Mr. Bauman: May the record likewise indicate the witness has identified the defendant Irving Koerner.

Q. Did you sometime in March '44 see the defendants, Irving Koerner and Morris Alprin? A. I did.
Q. And can you tell me, please, where it was that you saw them? A. I saw them at my office.
Q. And would you please tell us whether you had a conversation with them at that time? A. I did.
Q. What did you say to them and what did they say (195) to you?

Mr. Kiendl: I object, if your Honor please, insofar as the defendant H. H. Klein is concerned on the ground that he was not present and the testimony is not binding upon him.

Mr. Bender: Likewise for defendant Maurice Haas.

Mr. Greenman: Same objection for defendant Roer.

The Court: Sustained.

Mr. Bauman: May I please say, sir, that we shall, during the course of not only this witness's testimony, but many others, run into conversations which were in furtherance of the conspiracy, and this is the theory upon which this witness is asked to testify.

Colloquy of Counsel

Would your Honor reserve his ruling on this kind of a question until your Honor decides whether, in your opinion, you feel it to be in furtherance of a conspiracy or not? But I do feel that I must advise you that various of the defendants, evidence will be introduced, that various of the defendants did various things which the Government will contend was in furtherance of the conspiracy, and I am sure your Honor will agree that if such is the fact your (196) Honor will know, of course, what instruction to render at the proper time.

The Court: Well, we run into this situation in every case where conspiracy is one of the counts in the indictment. Before an alleged conspirator can be bound by the acts or statements of his alleged co-conspirators it must be established that a conspiracy exists. We must be realistic and practical in the realization that our juries are made up of laymen. I do not favor, although I don't know that there is any alternative, I do not favor the practice of bringing in a lot of information to a jury on the promise that it will be later connected, and until such time as I am satisfied that at least in my mind there is sufficient upon which the jury might construe a conspiracy to have existed, I am going to sustain objections to conversations in the absence of any defendant as being binding upon him.

Mr. Bauman: I wonder if I could respectfully refer your Honor to your Honor's answer to Mr. Kiendl in the preliminary conference when this very point was raised, when your Honor——

Mr. Bender: I am going to object to any statement of any preliminary conference, your Honor,

(197)

The Court: Why, because of the presence of the jury?

Mr. Bender: Not necessarily because——

The Court: Well, I certainly am not going to sustain any objection to my hearing anything that I said or counsel said in connection with this case. That is preposterous.

Mr. Bender: No.

The Court: But if there is anything that may prejudice the defendants in the jury room that might have been said in their absence, I will excuse the jury now, advise them to return at 2:15, and we will remain here, and the jurors will be instructed not to return to the court room, but to leave the building and we will remain here and beat out this little legal problem that we have.

Mr. Bender: Your Honor, it wasn't my intention to keep anything from the jury.

The Court: Oh, no, Mr. Bender. Let me make it very clear, and I am glad that you remind me of it.

Ladies and gentlemen of the jury, you must understand that these counsel are representing defendants whose liberty is involved and they have a perfect right—and not only a right—but they have (198) an absolute duty as lawyers representing clients to shield from your view and your hearing anything that may be prejudicial to their clients, so if in the course of this proceeding any counsel should arise and ask that the jury be excused because something has to be discussed that you should not hear, I want to impose upon you very emphatically that

you understand you are not to hold that against either the lawyer or his client, because if unfortunately you were the defendant, and he were representing you, he would do the same thing.

So the mere fact that counsel may on occasion get up, or the Court may indicate on the basis of something that counsel has said that the jury should be withdrawn, it isn't because anyone is trying to hide anything from you; it is because we want to keep your minds pure as the driven snow, so that nothing will impinge thereon which might give you a twisted notion of what is involved.

Now, with that little speech I will excuse you until 2:15.

Mr. Bauman: May the witness leave until that time?

The Court: Yes, surely.

(199)

(Witness temporarily excused)

(Jury retires)

Mr. Bauman: May it please the Court——

The Court: Yes, Mr. Bauman, what was it that I said that apparently is contradictory to what I just ruled?

Mr. Bauman: I just sent for the minutes of that.

Mr. Bender: May I make one further observation before Mr. Bauman starts? I also want to object at this time to the statement made by Mr. Bauman in the presence of the jury that the testimony of this witness will be in furtherance of the conspiracy and that your Honor, if he overrules the objection, will indicate, in effect, that it is in furtherance of the conspiracy.

I think Mr. Bauman ought to be confined——

The Court: I am in no position to tell now before hearing anything beyond which Mr. Jacobs testified to as to whether what was said between Jacobs and Alprin and Haas—was it Haas?

Mr. Bauman: No, it was Koerner, sir.

The Court: Koerner, rather—of what was said on that day between those three men, you want me (290) to rule that that was not in furtherance of the conspiracy.

Mr. Bender: No, I don't want the fact that you overruled an objection to be any indication to this jury that that means you think it is in furtherance of the conspiracy.

The Court: In the first place, I didn't overrule the objection. I sustained it.

Mr Bender: That's correct. I am only referring to Mr. Bauman's remarks.

The Court: Well, I can assure you, Mr. Bender, that by the time we reach the end of the road in this case the jury will have completely forgotten about this little opera bouffe that took place with respect to these objections.

Now, all that I said, Mr. Bauman, was that where it appeared from the testimony that a conversation took place between persons other than defendants, certain defendants in this prosecution, that the objection of one of such persons not present at the conversation will be deemed to be the objection of all such persons not present at the conversation, and it makes little difference to me if Mr. Kendl had arisen alone, if Mr. Bender had arisen alone, if (291) Mr. Greenman had arisen alone.

Mr. Bauman: Sir, that isn't what I am objecting to at all. You are entirely correct on that.

The Court: Right. What is it that I said that is contradictory?

Mr. Bauman: I just sent for the minutes of that conference that we had of counsel, I believe, on the Friday before this case proceeded to trial, and at that conference your Honor will remember that Mr. Kiendl raised precisely the point that is now before the Court, namely, will your Honor require the Government first to prove a conspiracy before it permits statements to be taken in the form in which they are now offered, and your Honor asked me what I thought about that and I said certainly that the cases, and just about every case that I have ever read, recognized that as an impossible, insurmountable burden to place upon the prosecution, and I said that it had never been done in this court and your Honor said, "Well, that is no real reason, is it," and I said "No, it isn't any real reason," and your Honor then said—I am confident the record will show—that you would not hold the Government to the very situation which you are now holding the Government to.

(202)

The Court: Oh, no. I beg to differ with you. I am not holding the Government to anything of the kind.

I think I made it clear that there has to come a time in this case when I will probably say to the jury, if I am persuaded that enough has been brought in, that even if that time may not be until

my charge, that if they believe a conspiracy occurred, that conversations made or had may be taken against all of those whom they find in the conspiracy, but until such time I think that these defendants are absolutely within their rights to rise and say that at least for the moment the jury understand that this is a conversation binding only on the people who took part in it.

Mr. Bauman: May I borrow a copy of the minutes from one of my adversaries for a moment until my own gets up here?

The Court: Well, I never got a copy of those minutes either, so I am at the same disadvantage as you.

Mr. Bauman: May I have just a minute to go through this?

The Court: Sure.

Mr. Bauman: No, these are the minutes of the trial.

(203)

Mr. Bender: Your Honor, do I understand you are not being furnished with a copy of the minutes?

The Court: No, the minutes of our conference of Friday, the initial conference, I did not get and I doubt if anybody else did.

Mr. Bauman: Sir, I think this question will be very, very easily resolved or, at least, what occurred, and the raising of this point, and the very precise point which is now before the Court——

The Court: Mr. Bauman, let me interrupt you and point out to you that at this early stage of the trial, with your first witness and your first conference between Koerner, Alprin and the witness

Jacobs, I am not going to permit the jury to even suggest in its own mind that that conversation had anything to do with the other defendants.

There may come a time in this trial, depending upon your proof, that I may open the door and say to the jurors, "If you believe a conspiracy has occurred, everything that was said by any of the persons whom you believe were part of that conspiracy may be taken by you to affect them all."

But at this early stage of the game I am not going to let the Government start off with a (204) presumption of a conspiracy.

Mr. Bauman: But that is precisely, sir, what I respectfully submit the minutes will show you said.

The Court: Well, if I ruled to the contrary earlier, I was wrong and I admit it, and if I didn't rule to the contrary, you misunderstood me; but in either event I am saying now that the Government is not going to have a presumption of a conspiracy and for the time being, at least, the only people who will be bound are the defendants who participated in these various conversations.

Now, in due course it may well be, at one point, possibly in my charge, possibly before, I don't know, I don't know how this case will unfold, that it will be encumbent upon me to tell the jury, "Notwithstanding the fact that certain conversations were excluded as to defendants who were not then present, if you find a conspiracy to have existed and if you find these conversations to have been in furtherance of the conspiracy, they may be held against absent defendants who were participants in the conspiracy," but I will not start off now at the beginning, on the eve of this trial, so to speak, the

first hour of the trial, to assess against these (204a) defendants the onerous burden of having them conspirators and bound by statements of alleged co-conspirators when we don't even know whether a conspiracy existed or we can't even reasonably anticipate that one did.

(205)

Mr. Bauman: Sir, what I am suggesting is not that we start off regarding them in the capacity of conspirators. I am not suggesting that.

The Court: Well, if you are not suggesting it, on what rule of law can people who are not present at a conference be bound by it?

Mr. Bauman: I am suggesting, sir, that conspiracy cases, as your Honor knows better than I, are proved——

The Court: Yes, and I would remind you that Judge Learned Hand had some very caustic things to say about the practice of the Government dragging everybody and everyone into a conspiracy case.

Mr. Bauman: I don't——

The Court: And if you want the citation, I will give it to you.

Mr. Bauman: I am familiar with Judge Hand's remarks in that case.

The Court: I feel exactly the way Judge Hand does, and I pattern myself on a great man, I think.

Mr. Bauman: Nobody disputes that at all, sir.

The Court: All right. But the point is this, the Government has to hoe a row here and it is going to (206) hoe it. Presumption of innocence is something more than mere lip service; to me it is a very important thing.

Mr. Bauman: It is to me, too.

The Court: I am sure it is to you, too. And I will hold the Government to the strict accountability of its burden of proof, and every right that is accorded under the rules, the statutes, the rules of evidence to any defendant will be very carefully, very religiously, observed while I am on the bench.

Mr. Bauman: I understand that, sir.

The Court: There is a rule of evidence that you cannot bind a defendant with statements made in his absence where he didn't have an opportunity to speak up and deny what was said. And the only exception to that rule is that where he is a co-conspirator, and I am not going at this early stage to throw that rule out of the window on a presumption that he is a co-conspirator. As I have indicated, Mr. Bauman, there may come a time when I will have to tell the jury possibly not until my charge, that: If you believe that there was a conspiracy and that if you believe that A, B, C, D and E were conspirators (207) and if you believe that A and B made certain statements and performed certain acts in furtherance of that conspiracy, notwithstanding the fact that I may have heretofore in this trial excluded that testimony as against C, D and E, I now tell you that if you feel the conspiracy, the participations in the conspiracy and that if these statements were made as part of that conspiracy, you may now, notwithstanding my previous ruling, assess against those absent defendants the testimony by the present defendants. But that is a far cry from starting off and saying that I will not sustain objections by people who are absent.

There is no purpose in our discussing it any

further, Mr. Bauman, that is the technique and that is the tenor.

Mr. Bauman: I respect the Court's ruling, but I just don't think I have gotten my position clearly across. I don't propose to argue with your Honor.

The Court: Then if I haven't fully understood you you are at liberty to go ahead.

Mr. Bauman: I just want to make sure that your Honor has it, that is, what I am asking the Court to do is to permit these conversations which (208) the Government claims were in furtherance of the conspiracy subject to a motion to strike if the conspiracy is not proved.

The Court: No.

Mr. Bauman: I just wasn't sure——

The Court: I don't like that technique at all, because as much as you can enjoin upon jurors to erase these things from their minds, they just can't. As a matter of fact, I am not completely satisfied that even though Mr. Kiendl and Mr. Bender and Mr. Greenman got up and even though I sustained the objection and even though the jury knew and understood that it was to apply only to the two defendants who were present at the conversation, I always have my doubts as to the ability of laymen, with due regard to their intelligence and everything else, to separate the wheat from the chaff, because particularly I know in these conspiracy trials, the few that I presided at, I have had a devil of a time trying to separate the wheat from the chaff in my own mind, and we are supposed to be experts.

I think it is making a mountain out of a molehill, so far as the Government's position is concerned. However, regardless of what its ultimate effect may

be, if the defendants timely (209) raise their objection I think they are entitled to be sustained. In a practical analysis, when it is all over it may mean nothing, because if the jury finds that there was a conspiracy, if it finds that all five defendants or those named in the count were in it, if it finds that statements made by some of them were in furtherance of the conspiracy, they will be able to take those statements against all. But I don't want them to start off with the notion that because Alprin and Koerner came to see Jacobs, that, ipso facto, that conversation binds people who were not present. You have to establish a little bit more than that before I will permit that.

Mr. Bauman: I have no alternative but to bow to your Honor's ruling.

The Court: A very wise course.

Now we will all adjourn for lunch.

(Recess to 2.15 p. m.)

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(210)

AFTERNOON SESSION

(The following proceedings were held in the absence of the jury.)

Mr. Bauman: With relation to your Honor's ruling, the Government respectfully requests that rather than have counsel for both sides in constant discussion of this problem and of constant objection, may I respectfully suggest that your Honor advise the jury as to, in general, what you are doing, namely, that at this point of the case your Honor

is admitting this evidence only against the individuals——

The Court: Directly involved.

Mr. Bauman: Yes, sir. And that you will make whatever determination in the case later on as is warranted by the evidence, period. Would it be in order for me to suggest that, sir?

The Court: I know that our Circuit has said that it is not necessary for counsel, once having stated his position, to constantly rise and reiterate his objection. On the other hand, I don't know that I have the power to stifle any objection that defense counsel might choose to rise and record.

Now Mr. Bauman is suggesting, if I correctly (211) understand him, that I advise the jury now that, regardless of whether their counsel objects specifically, that wherever a recital is made of occurrences between certain defendants and certain defendants and non-defendants in the absence of other defendants, that they are to accept that testimony only as chargeable against those who participated in the occurrence, until such time as the Court may advise them that they may consider that testimony against all defendants.

Now I would appreciate guidance from defense counsel as to what their notions are respecting Mr. Bauman's suggestion.

Mr. Kiendl: My notion is, if your Honor please, that it would be most unwise, from the standpoint of the defendants, if we had such a general observation as to one particular conference that was to cover all. I think defense counsel should indicate their objection when the conversation to which they are objecting is about to be interposed.

The Court: All right. I need inquire no further from the other defense counsel.

Mr. Bauman: I think I expressed myself with my usual lack of articulateness, Judge. I didn't (212) mean to say that counsel should not object. What I meant to suggest to the Court was, in fairness to both sides, that your Honor merely, in ruling upon the question presently before the Court, inform the jury that whatever evidence is admitted in this case and other cases where similar objections are made, are for the present being received only against the individuals who have made them, and that if, when, as and if that status changes, that you will inform them to the contrary.

The Court: I can see no harm in that.

Mr. Donohue: I most respectfully say to the Court that it might well overemphasize it at a time subsequently if your Honor saw fit to indicate to the jury that as of now an admission made by or a statement made by one defendant in the nature of an admission is not admissible as against all defendants; I think it might overemphasize to the jury the fact that your Honor has concluded in his own mind that the conspiracy has been established. After all, what we have been discussing is merely a rule of procedure, with which I think the jury has no concern.

The Court: Well, I will merely content myself with advising the jury that if I sustain objections (213) on behalf of any defendant who is not present at an occurrence which is the subject of testimony, they are to accept that testimony only as against those who were present. And I think I will go no further.

Will you bring in the jury, please.

(Jury in box.)

The Court: Ladies and gentlemen of the jury, I should like to emphasize to you that where I sustain an objection by any defendant to conversations had in his absence by other defendants, either among themselves or with third persons, you are to understand that in my sustaining that objection I am conveying to you that that defendant whose objection is sustained is not to be charged with a conversation thus held in his absence. Is that clear to all of you? Until such time as I may otherwise instruct you.

• • • •

II

Klein Welcomes Haas' Opinion Letter (Exh. 8)

(234)

Q. Now I show you Government's 8, Government's Exhibit No. 8, and I ask you if you can recognize that?

Mr. Kiendl: Did you say 8 or 3?

Mr. Bauman: 8. As your Honor will remember —no, this is No. 8—the Court gave permission that these exhibits be numbered in advance, I believe, so that we could save time, rather than have them numbered, and I am taking this one out of order. I hope it doesn't confuse anything.

The Court: No, it is all right.

A. Yes, sir, this is the paper.

Q. That is a photostatic copy of the document that Mr. Alprin showed you on that day? A. Yes. It may be a photograph, I don't know, but it is what I saw in the original form.

Mr. Bauman: I offer this in evidence.

I think I have another copy, if any of you gentlemen want one.

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(235) • • •

The Court: May I see the document, please.

Mr. Bauman: Do we have another copy for the Judge?

May I have the original, please?

Mr. Kiendl: I have the original.

Mr. Donohue: I would like to say that the defendant Alprin, who did not prepare this opinion, has no objection to its admission in evidence.

Mr. Bender: Maurice Haas, who did prepare it, that opinion, on the stationery of I think Haas, Schlesinger & Mayers, has absolutely no objection to the introduction of that exhibit. I do not think it appears in that copy that Mr. Haas signed that, but I believe he did, your Honor.

The Court: Well, the document before me, which is a reproduction, apparently, does not have any signature on it. So I take it that there is a concession by the defendant Haas that, despite his signature being lacking from this copy, he actually (236) prepared and signed this document?

Mr. Bender: There is, your Honor.

The Court: All right. The document is received as against the defendants Alprin and Haas, who

raise no objection thereto. It is excluded and the objections of the defendants Koerner and Roer are sustained.

And hearing no objection from the defendant Klein, it is received as against him, unless——

Mr. Kiendl: If your Honor please, you say it is received as against him. It was our purpose to offer it in evidence, as I indicated in my opening, if it hadn't been offered by the Government. And I would like to ask that it be received not only against him but in his favor.

The Court: Well, did I use the language "against him"? Well, I mean to correct myself.

Mr. Kiendl: I think so, your Honor.

The Court: That is a colloquial error on my part. What I mean to say is, that he not having made any objection to it none will be ruled upon by the Court, and the jury may consider it either in his favor or against him.

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(237) • • •

(Government's Exhibit 8 for identification received in evidence.)

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III

Government Agents Made Available to Appellants as Witnesses

May 17, 1955

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(3406)

AFTERNOON SESSION

ABRAHAM M. KIVEN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Bauman:

Q. Mr. Kiven, what is your business or occupation? A. Stenotype reporter.

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(3412) • • •

Mr. Bauman: The Government will offer Government's Exhibits 264 and 265.

• • • •

(3419)

The Court: Are Mr. Victory and Mr. McCarthy available?

Mr. Bauman: They are amenable to process but the Government does not propose to introduce this statement through them.

The Court: Well, are they amenable to process?

Mr. Bauman: Sure.

The Court: And what do you mean by "amenable to process"? That the defendants if they go

and search for them can serve them or will you produce them?

Mr. Bauman: We will produce them at the time indicated. I do not propose—they are available. Let me ask your Honor directly. They are available.

Mr. Donohue: If your Honor please, may I inquire if it is not a fact that Mr. Victory is employed in the Bureau of Internal Revenue right here in New York City?

Mr. Bauman: Of course, they are immediately available.

The Court: All right.

* * * *

IV

Testimony of Government Agent on Asking Klein, in October of 1946, About Income Tax Returns (Stricken by Trial Court)

(4154)

Raymond L. Brewster, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Bauman:

Q. Mr. Brewster, what is your business or occupation? A. I am an executive assistant to the vice-president and general manager of the Roller Smith Corporation in Bethlehem, Pennsylvania.

Q. In Bethlehem, Pennsylvania? A. Yes.

Q. How long have you been engaged in that capacity? A. Since the latter part of August of last year.

Q. And before that what did you do? A. Before that I was the Wage Administrator and Director of Labor Relations for Cascade Laundry in Brooklyn.

Q. How long did you hold that position? A. Since from around November 1946 till August of last year.

Q. What did you do before that, sir? A. Before that I worked for the Government from about April 1946 to November of '46.

Q. In what capacity? A. I was an accountant.

(4155)

Q. With whom? A. The Office of Price Administration.

Q. And in the New York region? A. That's right.

Q. Do you know the defendant Hyman Harvey Klein? A. I met Mr. Klein once in Baltimore, in 1946.

Q. And can you tell me when that was in 1946? A. Around October of '46.

Q. And you say you saw him in Baltimore, is that correct? A. That's correct.

Q. Where in Baltimore did you see him? A. In his office at—I believe it was at Tenvck Street.

Q. 10 Light Street, did you say? A. 10 Light Street.

The Court: No, he didn't say it. You said it.

Mr. Bauman: What did he say? I am sorry.

The Court: He said Ike Street.

The Witness: I thought it was Ike Street. Light Street is correct. It is the same building that the Office of Price Administration was in.

Raymond L. Brewster—for Government—By the Court

By the Court:

Q. You mean to tell me you were there from April until November of '46? (4156) A. No, sir, I was in New York regional office.

Q. I see. So that accounts for the fact that you didn't know what street it was on? A. That's right.

The Court: All right, go on.
Next question.

By Mr. Bauman:

Q. Did you have a conversation with Mr. Klein on that occasion? A. I did.

Q. Would you tell us, please, what you said to Mr. Klein and what he said to you?

(Mr. Greenman stands.)

The Court: It will be received only as to the defendant Klein, the objection of the remaining defendants thereto being sustained.

The Witness: Could you repeat the question, please?

The Court: Just a moment. There seems to be consternation at the defense table. Did I anticipate incorrectly? I take it you gentlemen were going to object. Now put your objections on the record.

Mr. Bender?

Mr. Bender: No, your Honor, we are just simply trying to recall whether this had to do with (4157) something which we discussed.

The Court: Yes, we discussed it and I think I made it clear at the time of our discussion that

admissions by any defendant to anybody were admissible.

Mr. Bender: Well, I was thinking of something else.

The Court: Yes. Now let us understand each other.

Am I correct in assuming that you would object to any conversation as to your client Haas between Klein and this gentleman on the witness stand?

Mr. Bender: Yes, and what I was deliberating here a moment ago is whether or not this was something collateral which had not been discussed with, your Honor, and on which you had made a ruling.

The Court: Well, I have a recollection when the subject matter to which you anticipate this is collateral was discussed I indicated that my ruling on that main subject matter would not apply to admissions et cetera made by any defendant to any person regardless of his capacity. Now if I am incorrect in that recollection I should like to be reminded.

(Defense counsel nod.)

(4158)

The Court: Your colleagues seem to agree with my recollection.

All right, you may continue, Mr. Bauman.

By Mr. Bauman:

Q. Now would you tell us what you said to Mr. Klein and what Mr. Klein said to you? A. Mr. Klein was asked at the time I saw him in 1946 if he was an officer of certain foreign corporations.

Q. Do you recall the names of the corporations about which he was asked? A. Well,——

The Court: Just a moment.

By the Court:

Q. Was anybody else present? A. Mr. Rokoff.

Q. Anybody accompany you there? A. Yes, sir.

Q. Well, now, when you say Mr. Klein was asked are we to understand that somebody else asked in your presence or you asked Mr. Klein that question? A. No, sir, my recollection is that all of the questions were asked by Mr. Perlman, one of the investigators who was also there.

(4159)

Q. All right. Do you recall Mr. Bauman's question? A. I believe he said what did Mr. Klein—what was Mr. Klein asked and what did Mr. Klein say.

Q. No; he said what did you say to Mr. Klein and what did Mr. Klein say to you. Now until you are asked what somebody else might have said to Mr. Klein in your presence will you please confine your answers to the questions addressed to you, i. e. what did you say to Mr. Klein, what did Mr. Klein say to you, and if you said nothing to him and he said nothing to you please tell us. A. I said nothing directly to Mr. Klein.

The Court: All right, now we got that out of the way.

By Mr. Bauman:

Q. Did a conversation take place in your presence between somebody and Mr. Klein? A. Yes, sir.

Q. And between whom or among whom did this conversation take place? A. Mr. Perlman, an investigator for the Office of Price Administration, did as I recall it, ask all the questions for the Government.

(4160)

Q. And who else was present at the time Mr. Perlman—A. Mr. Lowenthal, another accountant for the Office of Price Administration, myself, Mr. Rokoff and Mr. Klein.

Q. Now what were the questions——

The Court: May I iaject once again, please?

Mr. Bauman: Yes, your Honor.

By the Court:

Q. Now was any stenographic record made of this conference? A. The only record that I recall, I don't know if it was ever made, Mr. Rokoff was asked by Mr. Klein to take some notes of this hearing. I do not know whether he ever——

Q. Did anybody representing the OPA make any written memorandum as the hearing went along? A. Not as the hearing went along, your Honor.

Q. That's all. That's all I asked you.

Now you may continue.

By Mr. Bauman:

Q. Will you please tell us what the conversation was, sir? A. Mr. Klein was asked if he was an officer or director—and/or director of certain foreign corporations. (4161) I believe there were about eight or nine of them at the time. Mr. Klein stated that he was with the exception of one corporation.

He was asked, as I recall it, whether he was the president or treasurer of the corporations. He replied he was not the president and treasurer of one of the corporations.

Mr. Klein was then asked if the books and records of these corporations were available for our use. He stated no, that they were located in the foreign offices of the corporations where they were located either in Cuba or Panama.

We asked Mr. Klein at the time if he had filed any tax reports for these corporations which we could have access to, since the books and records were not according to him in Baltimore or in the United States. Mr. Klein refused any information on the tax reports.

Q. What did he say? A. Well, as I recall it Mr. Klein said it was none of our business whether there were any tax reports, that we were for Price Administration and we had nothing to do with taxes.

Q. Do you recall any further part of that (4162) conversation? A. No, sir. That is the most of that conversation that I can recall at this time.

Shortly after that we left.

Mr. Bauman: I have no further questions of this witness.

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V

Offer of Government to Trace the Disappearing $1,500,000

(4405)

New York, June 9, 1955;
11.00 o'clock a. m.

(The following proceedings took place in the robing room.)

The Court: • • •

(4410) • • •

Now we come to the second phase that occasioned our adjournment, and that has to do with Government's for identification 335, 339 and 340.

In view of Klein's voicing no objection to Government's 339 for identification (stenographer's minutes 4059) and 340 for identification (stenographer's minutes 4061), they will both be received as to him only and excluded as to the remaining defendants who objected thereto that except as to Government's 340 defendant Koerner makes no objection to check No. 2-186200 therein contained and which is received as to him and except that as to Government's 340 defendant Alprin makes no objection to two checks, each (4411) for $264,162.70, dated March 27, 1947, each payable to La Economica Agencias therein contained and which checks are received as to him and except that as to Government's Exhibit 340 defendant Roer makes no objection to the certificate of January 24, 1947, and a check dated March 27, 1947, to Compania Exportadora Fernandina for $272,423.62 and a check to La Economica Agencias dated March 27, 1947, No. 2-186200 for $264,162.70

therein contained and which certificates and checks are received as to him. Although Roer appears to have been a director of Tivoli Trading Co. S. A., at least until December 23, 1946 (Roer's Exhibit DJ) there is no proof of his direct participation in the instruction to purchase the $1,500,000 in certificates and in the absence thereof his objection to Government's Exhibit 339 for identification has been sustained.

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(4415)

Mr. Baumann: Now, your Honor, we wonder if I might have the statement of facts in the Government's memorandum on this motion deemed incorporated by reference into the record as an offer of proof which I understand pursuant to the opinion your Honor is excluding?

The Court: Yes.

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Government's Offer of Proof

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 145-147

UNITED STATES OF AMERICA

—against—

HYMAN HARVEY KLEIN, ISIDOR J. KLEIN, ALBERT McLENNAN, GEORGE NORGAN, ELLIS ROSENBERG, MAURICE HAAS, IRVING A. KOERNER, MORRIS O. ALPRIN, and ALBERT ROER.

IT IS HEREBY STIPULATED by the undersigned that the matter annexed hereto, incorporated by reference at the direction of the trial court during the trial below, as appears in the transcript of the testimony (R. 4415), shall be made part of the record on appeal.

Dated: New York, N. Y., November 25, 1955.

UNITED STATES ATTORNEY
By Joseph De Franco
Assistant U. S. Attorney

DAVIS, POLK, WARDWELL, SUNDERLAND & KIENDL
Attorneys for Defendant
Hyman Harvey Klein

LOUIS BENDER
Attorney for Defendant
Maurice Haas

F. J. DONAHUE
Attorney for Defendant
Morris O. Alprin

Government's Offer of Proof

STATEMENT OF FACTS

The story of the $1,500,000 begins on April 9, 1945, the day on which Tivoli Trading Co., S. A. (hereinafter referred to as "Tivoli") was formed. As will be demonstrated, defendant Klein appears in the records of the Royal Bank of Canada as an officer and director of Tivoli. The Government will prove that during the tax years 1945 and 1946 approximately $3,506,000 of the income from the liquor venture found its way into the accounts of Tivoli.

It is already clear from the record that in addition to the receipts which the Government will prove came into Tivoli during the years stated, substantial disbursements were made by Tivoli during the years 1946 and 1947 to certain of the defendants and or the sham corporations which they owned. Evidence is already in the record to the effect, for example, that three payments each over a quarter of a million dollars were made from funds of Tivoli by defendant Klein to corporations owned by defendants Alprin and Roer. Bank records offered by the Government, but not as yet received into evidence, indicate clearly that additional disbursements by Tivoli were made to sham corporations owned by Haas and Rosenberg.

Proof will be offered by the Government as to the extensive questioning by agents of the Internal Revenue Service with respect to the actual stock ownership and control of Tivoli. This proof will indicate sharply conflicting versions given to the Revenue Service as to the stock ownership. It is obvious, of course, that the Internal Revenue Service was endeavoring to ascertain whether or not Tivoli's funds were in any way taxable.

Government's Offer of Proof

Alprin, Koerner and Roer told the Revenue Service that they subscribed to the capital stock of Tivoli in 1945 and that the quarter million dollar draft each received was a liquidating distribution from Tivoli. Upon being confronted with photostatic copies of receipts for the return of their subscribing shares, these defendants told representatives of the Government that though they recognized their signatures, they did not recall ever signing such receipts.

On the other hand, the Government will prove that defendant Klein has taken a contrary position concerning the stock ownership of Tivoli from the date of incorporation up to January 20, 1947. In this connection, the Government will show that Klein told the Appellate Division of the Internal Revenue Service that he owned 25% of the Tivoli stock from the date of the incorporation of the company to January 1947, and that after the latter date he was the sole owner of Tivoli, having purchased the other 75 per cent of the Tivoli stock which had been previously owned in equal shares by the Canadian defendants not before the court.

Another version of the Tivoli ownership story, as the Government will prove, emanated from the defendants H. H. Klein and Ellis Rosenberg. These defendants told the Internal Revenue Service on several occasions that Rosenberg, Alprin, Roer, Koerner, Silver, Rokoff and Lechtzier subscribed a total of $2,850 for Tivoli stock at the time of its organization in 1945. Under this version, Klein has indicated that he intended to use Tivoli to pay all these individuals bonuses for their efforts in the Harwoods enterprise. According to Klein, however, he later decided against this on the advice of Rosenberg and returned the subscription money to all the individuals

named above, obtaining their signed receipts therefor. That some of these individuals, at least, have contested this version in their testimony before Government agents is already clear from the record in this case.

Similar conflicting stories confronted Government agents in all of their investigations concerning the cash receipts and disbursements of Tivoli and could only have impeded them in their efforts.

One of the most difficult problems which confronted the Government representatives was to ascertain the true nature of a disbursement appearing in the records of Tivoli bank accounts in the sum of $1,500,828.95. As the Government will prove, the account books of Regan Potter & Co. and Tivoli reflect a loan of $1,500,000, from Regan Potter to Tivoli in December 1946. The Government has already offered evidence indicating that by letter of February 1, 1947 H. H. Klein in the name of Tivoli ordered from the Royal Bank, Montreal branch, U. S. Certificates of Indebtedness in the face amount of $1,500,000. The proffered bank records also indicate that on February 11, 1947 these certificates of indebtedness were purchased through C. J. Devine & Co., New York brokers, Tivoli's account with the Royal Bank being charged with the cost of $1,500,828.95.

The Government will show that on February 13, 1947, the securities in question were delivered to Ellis Rosenberg, who has told the Revenue Service that he in turn delivered the securities to H. H. Klein in the office of Haas in New York City. Haas has stated that he received the securities in his office from Rosenberg in Klein's presence, and that he received the securities in his capacity as attorney for Regan Potter & Co. Klein has stated that the securities were given to Haas acting

for Regan Potter in payment of the debt of Tivoli to Regan Potter and that he gave no other instructions.

Haas, however, has stated that he disposed of the securities in accordance with detailed instructions received from H. H. Klein. He has said that he was instructed to sell and convert $900,000 of the securities.

The documentary evidence to be offered by the Government will show that on March 13, 1947 $500,000 worth of the certificates were sold through Continental Bank & Trust Co. (now the Chemical Corn Exchange Bank) New York City, and that the proceeds were used to open an account in the name of Parsee, Inc., a corporation formed and controlled by defendant Haas. The proceeds of the $500,000 were subsequently transferred to an account in the name of Parsee with the Royal Bank, Toronto, branch. Later on in May 1947, an additional $400,000 worth of certificates were sold through the Royal Bank of Canada, and the proceeds of this May sale were deposited in the Parsee account with that bank's Toronto branch.

Haas converted these certificates into $50 and $100 bills and delivered $300,000 in cash to I. J. Klein at the Hotel Chateau Laurier in Ottawa, Ontario on April 26, 1947. Exclusive of Haas' statement to this effect, the Government is prepared to prove by independent evidence that Haas, H. H. Klein, I. J. Klein, McLennan, Silver and Koerner were registered at the Chateau Laurier on April 26, 1947.

Further, Haas told the Revenue Service that on May 11, 1947 he delivered an additional $100,000 in currency which was part of the proceeds of the certificates to I. J. Klein at his home in Vancouver, B. C. According to Haas, an additional $500,000 in currency was placed in a safe deposit box in the Toronto branch of the Royal Bank in

the spring of 1947. (Despite the statements of Haas to the Revenue Service, the Government will offer statements of I. J. Klein, McLennan and Norgan, made in July, 1953, wherein they denied any knowledge of the fund of $1,500,000, and specifically denied receiving any part of this fund from Haas or anyone else. Later that month the Canadian Foreign Exchange Control Board blocked the Parsee safe deposit box in Toronto which then contained this $500,000 in cash.)]

In February 1949 it can be established that the contents of this safe deposit box were released by the Canadian authorities, whereupon Haas took the $500,000 in currency from the box, transported it to New York and placed it in a safe deposit box in the name of Belaire Management Co., a Klein company, at the Chemical Bank. According to Haas' statements to the Government, he was accompanied on that trip by Harry Silver.

In the spring of 1949, according to Haas, one Basil Windrum, a representative of United Distillers, Ltd. in Toronto came to New York and met Haas, on which occasion Haas turned over to Windrum the fund of $500,000 in cash. Haas has told Government agents that the foregoing was done at the instructions of and for his client, Regan Potter & Co. which he took to mean I. J. Klein and McLennan. However, he has told them that he received all of his instructions from H. H. Klein; indeed, he has stated that each step which he took in his manipulations of the $1,500,000 was at the explicit instructions of H. H. Klein, although Klein has denied this.

Haas has further told Revenue agents that in March or April of 1947 he delivered the remaining $600,000 worth of certificates of indebtedness to Windrum in the Toronto

office of United Distillers and that this was done on the instructions of Rosenberg acting for H. H. Klein. It was at this time that Haas has said that he was first introduced to Windrum. According to him, the introduction was made by Rosenberg. Both H. H. Klein and Rosenberg have denied this or any knowledge of Haas' meeting with Windrum in March or April 1947.

Further, with respect to the additional $600,000 worth of certificates, Haas has told representatives of the Revenue Service that Windrum came to see him in New York City in 1948 and requested him to cash these remaining certificates. Haas refused to do this. However, according to his story, he told Windrum that he, Windrum, could convert these securities into cash, and that he, Haas, would do what he could to arrange proper introductions at the banks for this purpose. Haas' story is that he thereupon introduced Windrum at two branches of the Chemical Bank in New York, at one under the name of Harry Glassberg, and at the other under the name of Frank J. Singer. Under these assumed names, according to Haas, Windrum disposed of the securities and received and deposited the proceeds thereof. Documentary proof will establish that the $600,000 worth of certificates were disposed of as follows:

> $100,000—redeemed on November 19, 1948 and proceeds thereof credited to the account of Frank J. Singer. This account was closed on January 7, 1949.
>
> $100,000—redeemed on November 1, 1948 and proceeds credited to account of Harry Glassberg. This account was closed on November 26, 1948.

Government's Offer of Proof

$400,000—redeemed on October 6, 1948 and proceeds credited to the account of Frank J. Singer. In October 1948 these proceeds were used to purchase $399,000 worth of U. S. Treasury bonds, 2½%; these securities were divided into 79 bonds of $5000 each and four bonds of $1000 each.

As to the $399,000 worth of Treasury bonds purchased as aforesaid, Revenue agents have made an extensive search to account for the disposition thereof, and the Government is prepared to prove that three $1000 bonds were disposed of by Haas and a substantial number of these bonds by Roer.

Despite Haas' statement about Windrum the Government will prove *that it was Maurice Haas, rather than Basil Windrum who used the assumed names of Glassberg and Singer in order to dispose of the certificates and to withdraw the proceeds thereof.*

In his 1947 income tax return filed in 1948, defendant H. H. Klein stated that the assets of Tivoli had been assumed by a new corporation known as Hannes & Co. Klein further stated in his tax return that Hannes, as the successor to Tivoli, had certain outstanding contingent liabilities, the nature and extent of which could not be ascertained at the time at which he filed his return. Accordingly, Klein further represented in his tax return that he was unable to set forth the tax liability, if any, which he might have with respect to his ownership of stock or participation in Tivoli, or Hannes as the successor to Tivoli.

It should be noted in connection with this summary of the facts with relation to the story of the $1,500,000 and Tivoli that the books of Regan Potter, which the Govern-

ment proposes to introduce into evidence, contain an entry dated February 25, 1947 indicating that the alleged loan of $1,500,000 was repaid by Tivoli by means of the delivery to Regan Potter of $1,500,000 worth of securities. These same books further show an entry under date of April 3, 1947 to the effect that the aforesaid $1,500,000 was used to pay commissions due and owing by Regan Potter. These facts as indicated by the books of Regan Potter are significant, particularly in view of the evidence which the Government is prepared to offer to the effect that Haas was cashing certificates of indebtedness allegedly for Regan Potter long after Regan Potter's books show the $1,500,000 was disbursed in payment of commissions.

Finally, in order to place the story of the Tivoli transactions and the $1,500,000 in its proper perspective, it should be indicated that the Government is prepared to prove that, at the instructions and request of defendant H. H. Klein, Haas met Klein in Baltimore in the latter part of the year 1946. According to Haas, on that occasion Klein asked him to prepare "a statement" of Klein's business transactions for the years 1944, 1945, and 1946. Haas thereupon prepared consolidated balance sheets for Regan Potter, Waldorf & Co. and Seaboard Syndicate as of December 31, 1946. This was done of the basis of information or trial balances submitted to Haas by Klein. The final consolidated balance sheets prepared by Haas were sent to Klein under a cover letter dated January 17, 1946. This letter stated that the balance sheets were prepared without audit. No balance sheet or sheets for Tivoli are included in the group sent out under the covering letter of January 17, 1946.

Subsequent to his preparation of the balance sheets,

however, Haas came to learn considerably more about Tivoli and its affairs, as is demonstrated by the above summary of his participation in the $1,500,000 manipulations. In addition, the 1947 income tax return filed by defendant H. H. Klein contains the signature of Haas as the individual who prepared this return. These matters and other evidence will conclusively establish, in our opinion, that Haas had extensive knowledge of all the Klein companies involved in the liquor venture during the years 1944 through 1946, including Tivoli, prior to the time when the 1947 tax return of Klein was prepared and filed.

• • • •

VI

Trial Court's View of the Difficulties of Proof Under Counts 1 Through 4

(4445)

The Court: You know, the great mistake that was made in this case—I don't say that it shouldn't have been brought, but it would appear to me, and I may be completely wrong about it, that the indictment was brought against the wrong people for the wrong crime. The corporations should have been indicted for not paying their income tax, on the theory that Klein, or of the papers went to Canada, et cetera, et cetera, that Klein was actually operating a business here in the United States. That is as simple as that. But instead of that the Government has itself impaled on the horns of a dilemma by a very inartistic indictment, trying to spell

out crimes against people, where I think it just hewed a most difficult course for itself.

It would seem to me that the only crime that the Government would have any semblance of a chance of getting a conviction on would have been simply an indictment against the corporations and the individual returns of the corporations for not having paid their taxes, the corporate taxes during those years, on the theory that even though they were located down in Cuba or Panama and ostensibly they took place from that source, and even if title to the (4446) liquor passed up in Vancouver, that because of the fact that everything that was done was done within the confines of the territorial limits of the United States that they should have paid the taxes, and you wouldn't have been confronted with this very trying situation. But that is spilled milk.

* * * * *

VII

The Trial Court's Realization That Its Procedure on the Admission of Evidence Created Many Problems and Might Have Been a Mistake

June 29, 1955

* * * * *

(6081) * * *

The Court: The same ruling.

The next to be considered is Government's Exhibit 29, which was received at page 412.

This was excluded as to Klein, Haas, Alprin and Roer —it was the first affidavit re Harwood commissions prepared by Jacobs for Koerner, et cetera, et cetera.

In view of the fact that none of the surviving defendants—it was not admitted as to any of them, I see no basis on which they can move to strike it on the fifth count—it is not in the record any more.

Mr. Kiendl: Well, if it is understood that that exhibit is out of the record, that is fine.

The Court: Does the Government offer it now—or it couldn't very well do that, having rested, (6082) but does the Government wish to be heard on the Court's conclusion that having been originally excluded as to the remaining defendants it is no longer any part of this record?

Mr. Bauman: May I have just one moment to look at it?

(After examining) Your Honor, the Government would like to be heard on the question of retaining this exhibit in evidence for the following reasons:

This affidavit, or what purports to be the first page of an affidavit was prepared during 1948 at the request of one of the co-conspirators on the fifth count, Irving Koerner.

The Court: No, it was prepared at the request of Agent Victory of the Internal Revenue Service.

Mr. Bauman: Yes, that is true but the information was given by——

The Court: Oh, you mean it emanated from him through Jacobs.

Mr. Bauman: Exactly.

The Court: But I am correct in my recollection that it was Victory who asked for it.

Mr. Bauman: Yes, you are.

(6083)

The Court: All right.

Mr. Bauman: And indeed that is one of the reasons that the Government feels that what I think is an excellent expression of the fifth count on the question of whether or not this is an attempt to throw sand in the Government's eyes, that particularly since it was asked for by Victory and particularly since it was intended to cover up this situation, that it should be admissible in connection with the fifth count.

The Court: That poses a very neat question, and it is more one of semantics. Here is a document that was received originally only as to the defendant Koerner but was excluded originally as to Klein, Alprin and Haas, the remaining defendants. Now assuming arguendo that the Court was in error before the Government rested in not admitting that under the fifth count at that time as against these defendants, does the Court still entertain the power or does the Government have the right, having rested, to now offer the document and does the Court entertain the power to receive it?

Mr. Bauman: I think, to answer your questions, first of all, the document is in evidence and it is in (6084) evidence subject to certain limitations.

The Court: It is in evidence only as to the defendant Koerner.

Mr. Bauman: It is in evidence subject to the limitations your Honor fixed upon its receipt at the time it was received.

The Court: Yes.

Mr. Bauman: Now it seems to me that what you may have in a case of this kind—and perhaps in the case of

several other documents involving Roer and Koerner, who are no longer before the Court—might be a category of exhibits which could be handled in two ways: One, based upon your Honor's theory of submitting the case, the jury could be instructed at that time that if it comes to the conclusion that there was no conspiracy, of course it cannot consider these documents. On the other hand, if the jury does come to the conclusion that a conspiracy did in fact exist, and if it comes to the further conclusion that this was an act in furtherance of that conspiracy, they may consider these documents previously only received as against the defendant Koerner. So far as the Court's authority to receive documents——

(6085)

The Court: You are merely restating that which I said would be the technique of receiving proof and the ultimate application of proof in the course of the trial.

Mr. Bauman: That is true.

The Court: But now we have come to another situation—I may be splitting hairs but it poses a very neat question to say the least. Here was a document admitted only as to the defendant Koerner. It was excluded as to the defendants now left here: Klein, Haas and Alprin.

You are, in essence, saying to me that under the fifth count, if the jury come to the conclusion that there was a conspiracy, that they might consider this document, and I would have no quarrel with you if it were a document admitted as to one of the surviving defendants—and by "surviving" I mean still on trial—but it isn't that.

Mr. Bauman: And that is why I am raising the point with your Honor.

Colloquy of Counsel

The Court: Then that poses this question to me: May you be permitted now, having rested, to offer a document which I—and we will assume erroneously—excluded when I excluded it—should (6086) have admitted it as to the fifth count—we will assume that—as against the remaining defendants?

Mr. Bauman: I intended to say on that subject this, sir, I think that the Court has clear power and discretion to permit the Government to reopen the Government's case, although in fact the Government has rested. I think the Court does have such discretion.

The Court: Oh, yes.

Mr. Bauman: And I would make such an application with respect to such exhibits having in mind that if the Court granted such permission and it exercised such discretion to reoffer, and only for that purpose would I make such an application to reoffer these exhibits.

The Court: Then I will tell you, of course in the posture of a motion to strike we have nothing confronting us at the moment because neither Klein nor Haas nor Alprin are moving because there is no necessity for them to move, the exhibit having been excluded as to them originally.

Therefore I would suggest that we hold in abeyance any of those that fall into this category until we formulate a little better in our minds as we (6087) go along what classifications these documents fall into.

Mr. Bauman: Yes.

The Court: And we will come back and reconsider later on whatever application the Government may be disposed to make with respect to exhibits admitted, or testimony received as to defendants no longer in the trial.

The first one that will go on that list for later consideration will be Government's Exhibit 29.

Mr. Bender: Your Honor, I wonder if I might in my own mind have this straightened out:

I thought that these exhibits which were not admitted as to us were not going to be considered as to us in the trial—I mean with regard to the fifth count.

Now Mr. Bauman just got up and indicated that your Honor is still following the same procedure that you indicated before, so that at some point, if this case goes to the jury, the jury may be told to use, if they find a conspiracy, these documents against all of us.

Under those circumstances we have to take a position with regard to whether or not these documents (6088) should stay in the case or shouldn't because ultimately we may be faced with the problem that they will be used against us.

The Court: No, you misunderstood what we concluded. What we concluded is that we did not conclude anything. We concluded that as of this moment Government's Exhibit 29 is not to be considered by the jury as to any defendant as to whom it was excluded, and it was excluded as to all three defendants. It was originally admitted only as to Koerner. The Government has suggested that it now be given the opportunity of reoffering that exhibit solely under Count 5 upon the—which you must have to accept as the premise that the Court was wrong in excluding it as to Count 5 originally as to any one or more of the three defendants remaining on trial.

The Court has suggested that anything falling in the category of having been received only as to one or both of the defendants now out of the case, i. e. Koerner and Roer, be held in abeyance, and that if the Government

wants to make any such application afterward, after we have concluded our complete review of the motion to strike, we will then (6089) address ourselves to that question and that question alone, i. e. the Government's request that it now be permitted to offer these things which had previously been excluded.

Mr. Bender: That is only as to Exhibit 29. Now what about the other exhibits which we have discussed here where you have stated to either Mr. Kiendl or myself or Mr. Donohue that since this was not admitted as to us, we have no basis for a motion to strike.

The Court: Well, I did not understand that what Mr. Bauman intended to say was that where an exhibit had originally been received as to a defendant now on trial, and had been excluded as to another defendant now on trial, that he was going to ask that that be enlarged to include a defendant now on trial as to whom it was originally excluded. That is what throws you, is that right?

Mr. Bender: And also, if your Honor should ever say to the jury, as you have indicated, that if they find a conspiracy even though you have originally admitted one of these exhibits as to the defendant Alprin and not as to the defendant Klein or the defendant Haas, nevertheless they might consider (6090) everyone of those exhibits against all of them—now if you should ever make such a statement to the jury, then we have no—we having sat here and not tried to give you a basis for excluding the exhibit in this discussion, we in effect have waived it.

The Court: Oh, I think you are putting the cart before the horse.

I don't follow you at all. I think your argument is completely specious for this reason:

It is excluded—let us take a given piece of evidence, a document received as to the defendant Klein but excluded as to the defendants Haas and Alprin.

Mr. Bender: Right.

The Court: Let us consider that.

Mr. Bender: Yes.

The Court: You are complaining about the fact that in my charge I may say to the jury—and I fully intend to say to the jury so that we can dispel any doubt about it—in essence, this, that if they find beyond a reasonable doubt that there was a conspiracy under the definition of conspiracy that I will have previously given them, to effectuate that which in my view—and which I will instruct (6091) them, constitutes the charge of the fifth count, that if they find such a conspiracy to have existed, that they might receive as against any defendant whom they will have found to have been a part of that conspiracy, a participant therein, any evidence received as against any other defendant provided they are satisfied beyond a reasonable doubt that that evidence came into being as part of the conspiracy, and that upon resolving all of those preliminaries they might then, notwithstanding my exclusion of that particular piece of evidence as to the defendant Haas and Alprin, received as to both or either of them.

Now that, in essence, is what I propose to charge.

Now upon having been advised thereof, may I now know what it is you are trying to convey to me, because I must confess that so far it hasn't registered.

Mr. Bender: Well, all I am trying to say to you, your Honor, is that inasmuch as ultimately we may be faced with the problem that the jury might consider some of these exhibits against those, or as to those against whom

it was not admitted originally, that we should be in a position here, even though an (6092) exhibit was not admitted against us, to be able to state to you that this exhibit does not belong in the case under the fifth count, and merely because it was not admitted as to us is not a reason for denying us our right for a motion to strike.

That is all I am trying to say.

The Court: Well, am I to understand, then, what you are saying now is—and I don't want to get boxed in here but what you are saying now is that you have the right, despite the fact that a given exhibit was originally excluded as to you, to state your objection thereto at this time?

Mr. Bender: I think so. I am only saying that I think so, in view of the posture of your Honor's original ruling.

The Court: Well, the point is this, though, you have to fish or cut bait. You can't have both. I adopted a technique in the process of this trial, and it may very well be that I will never do it again if I try a conspiracy case again—it may well be that based upon the experience I am having now in this one, of being particularly cautious of the defendants' rights, that the trial judge invites (6093) just too much trouble for himself—that maybe the better technique is the technique of tradition: Let the Government put everything in under the guise that it is background of the conspiracy, and then put on the defendant the burden of coming forward with a motion to strike. Maybe that is a better way to do it, but in order to avoid the possibility of reversible error on my part, I can see from your statement that the only thing that will satisfy you is that we go back to No. 1 and start all over again, and let each defendant against

whom an exhibit heretofore considered this morning was excluded make a statement on the record for whatever he wants to say, but I cannot for the life of me understand how a defendant can move to strike—and that is what we are doing now; we are not ruling on admissibility in the ordinary sense, where a document is offered. Those I have reserved for a later statement by the Government. We are now in the area of the defendants moving to strike evidence, and we have committed ourselves for expediency to talk about objections, and objections being sustained and objections being overruled, but we are not objecting in that sense at all.

(6094)

The defendants remaining on trial now are moving to strike certain testimony and certain exhibits, and I, for the life of me, cannot see how the defendant Haas, for example, can move to strike an exhibit that was not received as to him— and if you will be good enough to explain to me on what theory he can, I will be very happy to listen to you.

Mr. Bender: Your Honor, I must state that I have no intention of boxing you in—that is the farthest thing from my mind.

The Court: I did not say you intended it. I said that that might be the unwitting result.

Mr. Bender: Not at all. I was simply calling to your attention this fact, just as we had to contend with another fact, you will recall, when the questioin of cross-examining a witness who said nothing about any of the defendants, and yet we had to go ahead and do it or otherwise we would waive the right. I don't care how you do it, frankly. I am not thinking about the Circuit Court or anything else. I am merely trying to say to you that in the event

we are faced with it, I would like to be in a position to say to you, like Mr. Kiendl or Mr. Donohue, (6095) that this exhibit should not go in.

The Court: Should not go in?

Mr. Bender: Yes, for any purpose.

The Court: You see, we are getting into the habit of using peculiar language. What do you mean by "not go in"?

Mr. Bender: For any purpose at any time against the defendant Haas, and it should not stay in.

The Court: In other words, you want me to tell this jury that if they find a conspiracy and they find that Haas was in it, and they find that part of that conspiracy was a given document, and although I had admitted that document only as to Klein, that I may then tell the jury that they are not going to be permitted to consider that document as to Haas.

Mr. Bender: No.

The Court: That is what you are asking.

Mr. Bender: No.

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VIII

The Court's Suggestion on the Preparation of "Dossiers" and Its Rejection

July 5, 1955

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(6611) • • •

The Court: Well, that's why I brought it up now to give you gentlemen an opportunity. In any event one thing would be necessary if we were to ultimately adopt that procedure, and that is that if there remain in evidence any exhibits that were summarized they would have to be supplied. That is number one. That is no difficult problem. We can review that in a half an hour.

Number two, that as to files of bank records where there remained in evidence only specific documents in the files such as checks, they would have to be extracted and supplied.

Now so far as the transcript of the minutes is concerned on the testimony that is so slight that I could arrange to have my secretary begin working on that and making the necessary transcripts, but I would invite you gentlemen to think about it and give some alternative other than the three I have mentioned, i. e., my telling the jury about it when we conclude our labors, or my reserving it to the charge, or my giving them what I characterize as dossiers A and B. If any other technique suggests itself to you gentlemen, I would appreciate your calling it to the Court's attention.

(6612)

Mr. Bauman: I shall think about it on behalf of the Government and I should say—I want to say as a matter of first impression I have some reservation about your Honor's suggestion but I hope to come up with another.

The Court: Well, I hope that the criticism will be constructive. In other words, if you don't like any given technique that has been suggested then come up with an alternative. But just don't leave me out on the edge of the springboard.

Mr. Bauman: I hope I haven't done that during the case and I don't propose to do it now.

The Court: No.

Mr. Bauman: I didn't mean to say that I didn't agree with all three of them. It is this one that I want to think over, that is, the one that employs the dossiers. But certainly the usual one of summarizing to a jury what has taken place during the argument of these motions is something which I could have no objection to. It is that third one that I want to think about.

The Court: Well, you see what happens from my experience here. The jury will send in and ask for a specific exhibit or they will send in and ask to have particular testimony read back, and if perchance, as is so much more possible in this case than the run of (6613) the mill case, the exhibit has been stricken or the testimony has been stricken, it leaves them in a very difficult state of mind if all they get is a very perfunctory "Well, you can't have the exhibit" or "you can't have the testimony because it has been stricken." Whereas my thought was that if they had the exhibits before them and the extracts of the testimony, which so far are so slight that it might simplify your summation, it might simplify my charge, and it might bring about a better understanding on their part of what is involved in the case.

Well, you think about it, gentlemen, and we will discuss it again at a later time.

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Colloquy of Counsel

(6671) • • •

The Court: I take it you address your questions to me, because after after all I will be the arbiter of what Mr. Bauman will be permitted to say. And before I can answer your question I am afraid I will have to inquire what your night's thinking has brought as a result regarding the Court's suggestion that the exhibits and retained testimony be given to (6672) the jury in two folders? I am asking you all.

Mr. Kiendl?

Mr. Kiendl: We haven't changed the position we expressed yesterday, your Honor. As a matter of first impression it did appeal to us as a possible solution. We haven't reached any conclusion about it. But I am very much disturbed by the Government's attitude that they are against it.

The Court: The Government's attitude won't disturb me, won't disturb me—I should put the accent on the "me," because if the defendants are agreed to the process I propose to adopt it.

Mr. Bauman: I would like to be heard on that, sir, if I may.

The Court: You will have your opportunity of being heard immediately, because I can't answer Mr. Bender's question until I make a resolution of just what technique is going to be employed in advising the jury of what has been stricken and what remains.

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July 12, 1955

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(6957) • • •

The Court: If any defendant objects to the transcript of the minutes of the Government's case going to the jury, if any defendant objects to it, that will be the end of it, I won't do it.

Mr. Bender: Well, is the Government objecting? Because they originally objected to it.

The Court: Frankly, I don't care very much whether the Government objects, because they don't have the right to appeal. If I think it is within my discretion the proper thing to do, I am going to do it. However, if a defendant objects to my doing it then I am not going to do it because I am not going to give the defendants an opportunity to go upstairs afterwards, in the event there is a conviction, and say, "Look what he did."

Mr. Bender: Your Honor, I wonder for my own——

The Court: Because I want to say, and this can stay on the record, you probably have a wealth of reversible error anyway, but I don't want to compound it.

But I feel this way, I wouldn't be too seriously influenced by the Government's objection if (6960) I was satified that that was the logical and intelligent way for the jury to get it. However, if any defendant feels that it is not to be done and objects to it, that will be the end of it. Now of course I don't want to put you to the labor of getting all these minutes together if they are not going to be used.

Mr. Kiendl: Your Honor's idea is just to have the testimony of the Government submitted to the jury?

The Court: No—well, when you say only the testimony of the Government, what I had in mind, we can do it one of a number of ways—confine ourselves to exhibits first, leaving the testimony out.

Colloquy of Counsel

Mr. Kiendl: I suppose we are all clear, we agree with your Honor's——

The Court: Do all defendants agree that it would be wise—well, of course, it is just a question of having them available, if the jury wants them they are entitled to have them anyway, but I thought it would be nice if we could have them all available, those that survive the motions to strike, and of course that will require, as you well understand in the case of those situations where a defendant gave me only summaries, the (6960a) preparation of either the original or photostats of the original, and in those cases where the Government originally introduced an entire file, the extraction from that file of specific checks, et cetera, that remain, survive the motion to strike.

(6961)

Now what I had originally thought was that there would be two folders, one folder would have the exhibits prior to June 1st, 1946, a second folder would have the exhibits subsequent to June 1st, 1946. The third folder would have all of the testimony that was not stricken, testimony in the Government's case.

Now I recognize, and I am frank to say so, that that is a very dangerous thing, even though it would include the cross-examination not stricken—very dangerous thing for the defendants, because they would be under the disadvantage of not having the written of their case to meet the written word of the Government's case so far as it survived motions to strike.

I phrased that very inartistically but I think you gentlemen know what I mean.

In other words, there might be undue emphasis in the jury's mind on that which was extracted from the Gov-

ernment's case and having it there in writing and having to rely solely on their recollection of what the witness testified to with respect to any proof that the defendants put in. And I feel that under those circumstances it would (6962) quite appropriate for any defendant to get up and say, "No, Judge, with that we don't go along."

Mr. Kiendl: And I rise and say, no, Judge, with that we do not go along.

The Court: All right. Then that eliminates any question of preparing the minutes for a dossier, so to speak.

Now then is any advantage to be gained in preparing a dossier of the exhibits? Why not just follow now the normal course and if the jury asks for the exhibits give them those that they are entitled to.

Mr. Kiendl: We would be delighted to have them all arranged in order so that they will be available.

The Court: Yes. The only thing is this: I want you gentlemen to understand that I am not going to turn to this jury at any stage of this trial henceforth and say, "Now I want you to know that the following exhibits were stricken and the following exhibits were not stricken," because that to me would be the most asinine waste of time, because if you were to tell me by numbers (6963) what exhibits were stricken and what exhibits weren't it wouldn't register and wouldn't make the slightest impact on me. So what we will do then is that there will be no preparation of minutes in dossier form, and the parties are asked to assemble the exhibits so that if the jury call for any exhibits they will be available. And assemble them in such a way that we don't have to scurry around when and if that time comes to determine was an exhibit excluded or was it not.

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IX -

The Agreement to Enter a Stipulation on the Travels of Money into Canada (Never Executed by Appellants)

(6992) • • •

Mr. Bauman: Then the Government will with relation to those checks which do not actually show within t. emselves that they were transferred (6992a) from New York to Canada present the Court after these statements with a list of additional exhibits which will round out that phase of the——

The Court: Oh, yes, we will cover that when we reach it.

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July 14, 1955

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(7081) • • •

Mr. Bauman: Now, sir, we come to the bank records that the Government would like to keep in the record.

(7082)

With relation to Government's 286, your Honor——

You gentlemen care to come over and take a look at this?

Mr. Donohue: These are all exhibits that were already stricken.

Mr. Bauman: These the Court and counsel will remember were in connection with——

The Court: Well, my notes show that 286 was stricken except three checks dated September the 6th, 1946, and one check dated September the 12th, 1946.

Mr. Kiendl: That is right.

The Court: My recollection also is that we reserved only one bank record. I think it was 315 or something.

Mr. Donohue: 315.

The Court: With a letter.

Mr. Bauman: Your Honor will remember that after we did that—that was correct at first—I pointed out that some of the checks which the Government contends were transferred to Canada during this period did not have the reverse side or any sufficient basis in the record for me to prove that they were in fact transferred (7083) to Canada.

The Court: Well, frankly I don't remember it, but I certainly wouldn't challenge your recollection of it. I am sure you might be able to point to the minutes where it was. But I frankly don't remember any such statement.

Mr. Bauman: All right, your Honor, maybe I can refresh your recollection.

Your Honor indicated to me to take a look at those checks that were in evidence where the check itself indicated that it had been deposited in the Canadian account, that there was no necessity of introducing the Canadian counterpart or any part thereof of that corporate account.

The Court: That is one of those rare situations where I don't recall it. There has been so much going on here in the last couple of weeks on these motions to strike that I have had quite a time of it trying to orient myself to everything as it occurred. I don't recall it, frankly. The only thing I do recall—but that doesn't mean that you can't do it—the only thing I do recall is on 315 you wanted to show merely a credit on a bank statement

or a debit and you didn't have the check (7084) and I said I would not accept that, that it might be for some other purpose and for some other amount. However, if there are among these checks that have been excluded from the motions to strike exhibits, if it is necessary to offer proof collateral to the check itself to prove its final resting place I will permit you to do that, because merely showing the drawing of a check on an account and nothing more, especially where I understand that you attempted to get photostats from the bank but because they have Recordak systems you were unable to get them, they didn't photostat the back, or record the backs of those checks.

Mr. Bauman: That is right.

Well, I should now like to proceed to offer those documents in the excluded bank records that are necessary to show the transfer of the funds in the period about which we have talked.

Mr. Kiendl: Why can't we stipulate all that?

The Court: Well, that's what I was wondering.

Mr. Bauman: That is all right.

The Court. Nobody seriously contests that this money, these checks that were drawn in New York (7085) finally came to a resting place in Canada, do they?

Mr. Kiendl: The checks were duly honored, duly deposited and duly cancelled or anything of that kind that you want.

Mr. Bauman: Well, are we all agreed as to that?

Mr. Donohue: I am certainly willing to stipulate if Mr. Kiendl is.

The Court: Well, the point I am making is this, gentlemen: I am going to leave you to your own devices when I part with you happily today and I won't see you

again until two o'clock,—I don't know why I say happily because I am going to be working all weekend. But when I see you again on Monday at two o'clock I expect you to come with a completed stipulation on all of the exhibits. Now if there is any question now that anybody won't stipulate, that for example the checks in 290——

Mr. Bender: 286.

The Court: —in 286 came to rest in a Canadian bank let him speak now or forever hold his peace, because I don't want this situation presented to me at 2.15 on Monday when I have hopes of bringing this jury back into the courtroom. (7086) So if anybody is going to quibble about this stipulation, let's have it now so that you won't have to all come out to visit me at Budd Lake tomorrow morning to get the question resolved—not that I wouldn't like to have you. I would even supply the grilled frankfurters.

(Laughter.)

Mr. Bender: As far as I am concerned, your Honor, I am not going to raise any problem.

The Court: Well, you were the only one, Mr. Bender, that did not forthright say so and I was really directing my remark at you. Mr. Kiendl said he would stipulate and Mr. Donohue said he would stipulate, and I would be very happy if I would hear you say, "I will stipulate."

Mr. Bender: Well, the only reason I hesitated was because I wasn't sure in my own mind just what Mr. Bauman wanted me to stipulate to. I wasn't sure whether——

The Court: Well, he wants you to stipulate—and see if I correctly state it, and then you will be in a position to say whether you are prepared to make the stipulation or not.

Colloquy of Counsel

Mr. Bender: Yes, that was the only reason why I hesitated.

(7087)

The Court: The funds that were withdrawn from New York banks by Mr. Klein, or that he caused to be transferred to Canadian banks.

Mr. Bender: You mean the corporate funds?

The Court: Yes.

(Mr. Bender nods.)

The Court: That was done by the means of certain checks.

(Mr. Bender nods.)

The Court: Mr. Bauman says that they do not have photostats in the various files of the reverse sides of those checks showing where they ultimately came to rest. He wants by documents from those files otherwise to prove where they came to rest in the Canadian banks. When he was prepared to move that these other documents for that purpose be admitted Mr. Kiendl said such motion was unnecessary, that he would stipulate as to each one of these checks.

Mr. Bender: I have no objection.

The Court: All right.

Mr. Bauman: Then that's that.

• • • •

X

The Procedure of Reading Summaries to the Jury

July 21, 1955

• • • •

(7141) • • •

The Court: • • •

Now, then, as to the modus operandi with respect to these summaries, gentlemen: When we convene on Monday at 2:15, the United States Attorney will be requested to read the summary of the Government's exhibits to the jury.

Upon the conclusion thereof, one of the defendants' attorneys or a nominee of the defendants' attorneys, upon whom I wish you would agree in the interim, will be asked to read to the jury the summary of the defendants' exhibits.

After that reading has been concluded, the Court will then read to the jury its summary of the statements of Koerner, Government Exhibit 249, and Alprin's first statement, Government's Exhibit 264, and Alprin's second statement, Government Exhibit 265—when I say "first" and "second," I mean in point of time, not in point of position in the minutes—and Roer's statement as reflected by testimony of the stenographer who took it, and Haas' (7142) statement as similarly reflected and Klein's statement as similarly reflected will be read, together with stipulations and testimony, not necessarily in the order in which I have given them to you.

What the Court will read, and probably this order, will me, first, the stipulations—I will withdraw that and indicate that what the Court will advise the jury, first,

will be of those stipulations withdrawn in a very general way. Then the Court will advise the jury of those stipulations not stricken in greater detail. Following which, the Court will advise the jury of its summary of the testimony in this manner:

It will first advise the jury of the names of all witnesses whose entire testimony was stricken. It will next advise the jury of the names of the witnesses no part of whose testimony was stricken without summarization. Those were two, Bennett and Valverde.

It will next advise the jury of the summary of the testimony in so far as the same was not stricken of Jacobs, Lowy, Ackerman, Salvatore, Rudin, Hill, Baker, Holahan, Burke and Rokoff.

Finally, it will in one group advise the (7143) jury of the portions not stricken of the statements of Koerner, Alprin, Alprin again, Roer, Haas and Klein, without regard to whether those are in the record by virtue of being exhibits or whether they are in the record by virtue of being testimony of the reporter.

Then I believe we will be in a position to go forward with further proof. None of the defendants have volunteered to inform so far, and the Court would be inclined to appreciate knowing just about how much time they expect to consume in testimony, because the Court has to begin to think in terms of preparing a charge.

* * * *

XI

The Government Advises Counsel and the Court That Roer and Koerner Intend to Use Fifth Amendment Rights

August 10, 1955

(8691)

(The jury retired from the courtroom.)

The Court: I am returning the extra copy of Defendant Alprin's Exhibit FV.

Mr. Bauman: Your Honor, I received a communication from some attorney by the name of Barr——

The Court: I received a copy of it, too—I don't know whether it is a copy, I don't know what you received, but I received a communication him. Inasmuch as it was sent to me and nothing in it indicated that a copy was sent to you or anyone else, I didn't think it necessary to advise you.

Mr. Kiendl: We received a copy. Ours did say that copies of it were sent to the United States Attorney and all defense counsel.

Mr. Bender: We all received a copy.

The Court: I beg your pardon; it does say that in the last paragraph.

Mr. Bauman: It is with relation to the matter of calling Mr. Roer and Mr. Koerner on rebuttal that I address the Court in the light of the information from the man who now represents those two gentlemen, who says that should they be called and questioned about the subject matter of this trial they will invoke the Fifth Amendment. It had been my intention and it is (8692) my intention, unless it is indicated to me to the contrary, to call those two men, put them on the stand and attempt to interrogate

them with relation to the areas that we have been going into here in connection with the fifth count of the indictment.

I feel in the light of the letter which I have received and counsel has received and the Court has received that I owe the Court the duty of advising it that I do intend to call those two individuals unless I am estopped by the Court from doing that.

The Court: Indeed not. I won't stop you from calling them. However, if they invoke their privilege, I will certainly sustain it. The indictment alleges in the fifth count that a conspiracy started in June, 1946, at least up until the grand jury returned the indictment, and according to the indictment continues up until that time, which would be within the statute of limitations, so they would be absolutely within their rights to claim the Fifth Amendment, and I would not compel them to testify if they claimed it. However, I cannot stop you from bringing them here into court and putting them on the stand.

Mr. Kiendl: I think we should advise the Court that there is some possibility of it being (8693) reversible error.

The Court: I would like to know about it.

Mr. Kiendl: As I understand it, I haven't looked it up myself, but I am informed that in the Hiss case there is some similar situation which arose, and there the Court of Appeals said in substance that under the circumstances of that case it would not be reversible error, but it indicated it possibly would be in a case such as this, where the United States Attorney has been officially informed that the proposed witness is going to take advantage of his constitutional rights. I just call that to your attention.

Mr. Bauman: We shall research the law this evening.

The Court: I will do likewise. Thank you for calling it to my attention.

Mr. Bauman: If that is so——

Mr. Kiendl: It is 185 Fed. (2d) 830.

Mr. Bender: Your Honor, the only reason they permitted it in the Hiss case, as stated in the opinion—I happen to have represented one of the witnesses who testified under those circumstances in that case, and I am fully familiar with the situation—the only reason why the Circuit Court condoned that activity (8694) on the part of the prosecution was because the witness Inslerman, whom I represented, testified to some matters about which he could not raise the privilege at all, and which the Circuit Court felt were material to the issue on trial. Here these witnesses will not testify as to any matter relevant to the fifth count and will claim their privilege. In that respect, the ruling in the Hiss case will not apply to this situation. Then the Court goes on further to say, however, were that not the case, they would be more likely or most likely to follow the general rule, that that would be an action on the part of the prosecutor which it would not condone and might constitute reversible error.

The Court: That is the prosecutor's problem, not the Court's. If the prosecutor wants to scout the perils of reversible error that will undo all that he has done, if he does get a conviction, that is his business. If he wants to call a witness and put him on the stand——

Mr. Donohue: Your Honor's responsibility comes with respect to the prejudice that would inevitably and obviously result to these defendants if two witnesses who were before this very jury as defendants until a few

weeks ago were permitted to come on the witness stand (8694a) and invoke their constitutional privilege about matters concerning which these defendants have testified at length, it would give the jury the obvious right to infer some criminal act because they won't testify about it. I think that would create an intolerable prejudice and situation.

(8695)

The Court: If the United States attorney got up and said to the clerk, "Call Irving Koerner to the stand," is the Court supposed to say "You will not do so"?

Mr. Donohue: Yes. If you have been advised by the United States attorney, who so very fairly advised you, and stated he has been advised that that witnesses if called will resort to the Fifth Amendment.

The Court: Let me see if I correctly understand your position. The United States attorney, now being put on his peril with full notice that they are going to claim their constitutional protection, gets up in court and says, "I call Irving Koerner to the stand," and simply upon that the Court turns to the clerk and says, "Do not bring Irving Koerner to the stand and do not swear him as a witness."

Mr. Donohue: I think now having been advised by the United States attorney of his purpose, assuming that Mr. Bauman would persist in his purpose——

The Court: That is why I am putting it in the language that I am, I think it is the primary responsibility of the United States attorney. If the United States attorney should undertake in the (8696) light of all this to call the witness and have him take the stand, do I understand that your position is that upon my being

notified by a witness that he is going to claim his constitutional privilege I should not let him take the stand? You realize the end result of that? All the witness would have to do would be to write a letter that he intends to invoke his constitutional privilege if he is called, and then when his name is called in the courtroom he can stand up and expect the Judge to say "Sit down, you cannot call him."

Mr. Donohue: I have no doubt in my mind that when your Honor reads the cases and finds that the very calling of the witness to the stand under the circumstances constitutes the very prejudice that your Honor has been so careful in this trial to avoid, as to what your Honor's course of conduct must be.

The Court: It certainly sounds like strange procedure to me, and I would not be so bold as to suggest that sometimes the Circuit Court evolves theory that in practice in the District Court just cannot be put into operation. It certainly sounds like a very strange rule to me. (8697) I am curious and I will find out, on the doctrine of stare decisis, I will find out what the rule is. However, it seems to me all the witness has to do is write a letter, in a case where he expects to be called as a witness, write a letter to the judge and all the counsel and say "I am going to invoke my constitutional privilege," regardless of whether he has it or not, and then it would appear under your construction of the case, as soon as the district attorney calls his name to ascend the stand, the judge stays him and says, "You wrote a letter and you cannot be a witness." That may be the law, and I won't challenge it, but I really have learned something today.

Mr. Donohue: On the basis of which the United States attorney has advised you that if the witnesses are called they will invoke the Fifth Amendment, and I must pay tribute to Mr. Bauman for his consistent fairness. It is no different from circumstance after circumstance when Mr. Bauman has told you "I expect to follow this line of testimony," and your Honor has indicated his ruling. I think when Mr. Bauman reads this case and other authorities he will be the first (8698) one to tell you your authority, and tell your Honor it he feels that this is prejudicial, he won't call the witness.

Mr. Bender: Do you think it might be worthwhile to make the letter to you, to Mr. Bauman and to all of defense counsel a matter of record, or just indicate that it be read into the record?

The Court: We can hold that until tomorrow.

Mr. Kiendl: In any event, we suggest the possibility of considering, if your Honor is right in your present construction of procedure, having the witnesses called in the absence of the jury and have them then assert their constitutional rights under oath, so no prejudice would result to any defendant.

The Court: That may be the solution to it, to avoid the danger of prejudice, but I am still very much alarmed by the prospect that the Court can refuse to allow a party to call a witness, it makes no difference whether it is the Government or anybody else, merely on the bare fact that the witness asserted to somebody he is going to invoke the Fifth Amendment. Mr. Kiendl's proposal may obviate (8699) the danger you speak of, Mr. Donohue, and that is that if the United States attorney indicates, notwithstanding the protestation of privilege, he is going forward with the calling of the witnesses, I may permit, and

this may be the logical solution of it, them to take the stand, so I won't transgress or overstep my powers, but have it done in an atmosphere in the absence of the jury where it cannot accomplish the prejudice that you are afraid of.

Mr. Bauman: That is perfectly acceptable to us.

(Adjourned to August 11, 1955, at 10.30 a. m.)

(8700)

New York, August 11, 1955;
10.30 o'clock a. m.

Trial resumed.

(Jury not present.)

The Court: That the record may be complete with respect to our discussion of last evening before adjournment, I read into the record a letter which was received by me on the letterhead of Barr & Barr, Counselors at Law, 342 Madison Avenue, New York 17, N. Y.

It is dated August 8, 1955, and addressed to me and states:

> "On or about the 28th day of June, 1955, Messrs. Albert Roer and Irving A. Koerner were served with subpoenas to testify as witness on behalf of the Government in the pending trial of the Fifth Count of the indictment entitled United States v. Klein, et al.
>
> "Please be advised that in the event (8701) that Messrs. Roer and Koerner are called to testify pursuant to said subpoenas with regard to any of the facts relevant to the issues presented by the Fifth

Count, they will assert their constitutional privilege against self-incrimination under the Fifth Amendment of the United States Constitution and will refuse to testify accordingly.

"I am sending copies of this communication to the United States Attorney and to respective defense counsel.

"Respectfully yours,

BARR & BARR,
JEROME H. BARRY;
Attorneys for Albert Roer
and Irving A. Koerner."

Now before engaging in any continuation of the discussion of the appropriate law involved I would like to inquire of the United States whether it has determined whether it will attempt to call Koerner and Roer as witnesses for the Government in rebuttal.

Mr. Bauman: Your Honor, the answer to that question is, we have searched the law and read the cases. The Court of Appeals in this circuit (8702) on two occasion expressed some reservation about a prosecutor calling a witness whom he knows is going to or has reason to believe is going to invoke the Fifth Amendment. They did it in the Hiss case and that was based on a dictum of Judge Frank in another case, the name of which evades me at the moment.

There are two other cases which I have read, one of them involving a Mann Act situation in another jurisdiction, and one in the Ninth Circuit, where the problem was similarly determined, and although in each case the Court has spoken of this situation disapprovingly I am not aware of one case in which a reversal has resulted.

Statement by the Government

However, having in mind the warning of the Second Circuit, I would respectfully suggest to the Court that Roer and Koerner, if the Court is so inclined, be interrogated in the absence of the jury and if Roer and Koerner do indicate that they will not invoke their Fifth Amendment, then the Government does intend to call either or both.

The Court: Well then your answer to my question is yes.

Mr. Bauman: That's it, Judge.

* * * *

XII

Summation for Klein on Disclosure of June-of-1946 Corporation Records

August 16, 1955

* * * *

(8884) * * *

We say it is fantastic to ask a jury to find in the light of that evidence, that complete disclosure, that truthful disclosure by Mr. Klein, it is fantastic to say that he ever had in mind the faintest notion of concealing the nature of his business activities or the nature and source of his income.

What is the next part of this conspiracy after June 1, 1946? It is alleged that it was a part of the conspiracy to make entries in the Tivoli books, to conceal the nature and source of the income (8885) of these defendants, and they point to an entry in the Tivoli book, page 14, which

shows in the journal "Accrued commissions and expenses, payable cash, Montreal Royal Bank, $528,325," and the second item, both March 27, 1947, "Commissions and expenses payable, Montreal Royal Bank, Compania Fernandina"—the first was Economica—"$272,000," those two items totaling $800,000, roughly.

They say in this complaint, in this count of the indictment, that the entries in the Tivoli books, those entries, were to conceal the nature and source of the income of Roer and Koerner and Alprin. And when I don't use the word "Mister," I am not doing it disrespectfully at all, I am just doing it in the interest of saving time.

They contend that these entries, which are literally accurate, checks were drawn to the accounts of Economica and Fernandina, to the accounts in that journal that Mr. Rokoff kept, are entered as commissions and expenses, not as liquidating dividends of Tivoli and they check Mr. Klein's contention that I will later come to.

Rokoff kept that journal. Rokoff says it was a memorandum record, that it was kept, and, of (8886) course, it was kept according to the instruction that came from his boss, Mr. Klein, and Mr. Rokoff and Mr. Klein didn't indicate at all that it was kept for the purpose of deceiving or throwing sand in the eyes of anybody, and it didn't. No one was deceived by those entries.

Did you have any witness come and say, "I looked at the journal of Trivoli and I saw these two amazing entries of March 27, 1948, $800,000 in commissions and expenses. I was deluded into believing they were commissions and expenses and not payments to Roer, Koerner and Alprin." Not a word of that in this case. They leave

Excerpt from Summation on Behalf of Defendant H. H. Klein

it to surmise. They leave it to some suggestion of some wrongdoing, and why?

Well, the Internal Revenue agents are not morons, they are not children. They are experts in their field. Mr. Klein knew if Mr. Rokoff didn't know, Mr. Klein well knew that if an Internal Reveue agent saw an entry of that kind in a book, all he had to do was to ask about it and get the information. $800,000--if he inquired: what is this Economica Corporation, what is this Fernandina Corporation, who are the stockholders, who had any (8887) interest in it, eventually it would be no trouble at all for an income tax collector to find out what all the entries meant, what it was all about.

• • • •

No. 593

FILED
NOV
JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

HYMAN HARVEY KLEIN, MAURICE HAAS and MORRIS O. ALPRIN,

Appellants.

PETITION OF HYMAN HARVEY KLEIN FOR REHEARING, OR IN THE ALTERNATIVE, A STAY OF MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

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FILED
SEP
1957

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PETITION OF HYMAN HARVEY KLEIN FOR REHEARING, OR IN THE ALTERNATIVE, A STAY OF MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

The appellant Hyman Harvey Klein respectfully petitions this Honorable Court (A) for a rehearing of his appeal in the above-entitled matter, and (B) if rehearing be denied, for a stay of the mandate and continuance of bail pending application for a writ of certiorari.

(A) Petition for Rehearing

This petition addresses itself to those features of this Court's decision wherein it is believed the Court failed to decide important questions presented, and in deciding other questions overlooked basic facts and controlling decisions of the Supreme Court of the United States, as well as precedents established by prior decisions in this and other Circuits. It is hoped that these considerations may be sufficient to induce the Court to review its opinion and redetermine the appeal in favor of a reversal of the judgment below.

I

Under the heading "Miscellaneous Objections" (2234-35) the Court's opinion subordinates one of the most vital points raised by Klein, namely, that his conviction was procured not only in violation of basic rules of evidence, but in deprivation of his constitutional rights: Klein's claim that reversible error was committed in the admission against him of hearsay statements made by Koerner and Roer to Treasury officials in the Fall of 1952.

The basic rule of evidence is that no one shall be convicted upon hearsay testimony. The constitutional right is that preserved by the Sixth Amendment—the right of the accused "to be confronted with the witnesses against him."

This Court recognizes that to be admissible the statements had "to be made in furtherance of the conspiracy"; and that in order to have been made in furtherance of the conspiracy, the statements had to be "logically either false or misleading" (2335).

It is undeniable, however, that these statements were presented to the jury by the prosecutor as *true*, i.e., as statements truly recounting to the Treasury officials in the Fall of 1952 that when Klein issued the drafts to Alprin, Koerner and Roer in 1947 he instructed them to hold the drafts until such time as he could clear up his income tax difficulties (IV, 2508-09). Therefore, the Roer and Koerner statements were proffered to the jury, not as "logically either false or misleading", but as true and as revealing Klein's criminal intent.

Hence, although not used by the prosecution as false or misleading but as true, the statements were nevertheless presented to the jury as having been made in furtherance of the conspiracy; and the jury were permitted, and indeed invited, to consider them both as true and in furtherance of the conspiracy. Yet true statements of fact made by

Roer and Koerner to Internal Revenue simply could not be in furtherance of a conspiracy to conceal those facts and to impede the Treasury.

The Court, however, finds there was no error in any event, since the "trial court's charge limited use of the statements only if the jury found them to be made in furtherance of the conspiracy, i.e., logically either false or misleading" (2235). But the jury were not charged that the statements could not have been made in furtherance of the conspiracy if they were true; nor that the statements could be found to have been made in furtherance of the conspiracy only if they were false. Without such specific enlightenment in the charge, the trial court's very general instructions as to when the declarations of conspirators are admissible (IV, 2567), were wholly inadequate to constitute an effective precaution against the erroneous use of these statements by the jury. Moreover, having heard the prosecutor in summation use these statements as true and as proof of the conspiracy, it surely would never occur to a juryman, without clear and explicit instructions from the Court, that he could only regard these specific statements as being in furtherance of the conspiracy if he found them to be false.

That the statements were seriously prejudicial to Klein is not questioned. That they were inadmissible is established by a long line of decisions in the United States Supreme Court and in this Court, which have not been followed. *Lutwak et al. v. United States*, 344 U. S. 604, 617-18; *Krulewitch v. United States*, 336 U. S. 440; *Fiswick et al. v. United States*, 329 U. S. 211; *Glasser v. United States*, 315 U. S. 60, 74-75; *Logan v. United States*, 144 U. S. 263, 309; *United States v. Sansone*, 206 F. 2d 86; *United States v. Lonardo*, 67 F. 2d 88; *United States v. Ah Kee Eng*, 241 F. 2d 157.

The foregoing discussion presumes, of course, that the original conspiracy was still in existence at the time when the alleged co-conspirators were being interrogated by Internal Revenue agents in the Fall of 1952—a time when,

as this Court puts it, the conspirators "had somewhat fallen out * * *," (2234), and when, as the Court finds, "the attempt to hide the existence of the drafts came to an end" (2221). This was after Roer, Koerner and Alprin had all ceased to hold their drafts and had used them in various ways; after Roer had filed his income tax return in 1951; after Alprin and Koerner had filed declarations of estimated tax for 1952; long after Klein had filed his 1947 return; and at the very moment when, as this Court correctly says, Klein was contradicting the stories of Alprin, Koerner, Roer and Haas (2221).

In its treatment of this phase of the case we submit that the Court has overlooked the fact that there was not sufficient evidence on the basis of which the jury could reasonably have found that the original 1946 conspiracy still existed in the Fall of 1952, or that Klein still remained a member of it, assuming there ever was such a conspiracy and that Klein was ever a party thereto.

If the conspiracy had ended or if Klein was no longer a member of it, the statements were likewise inadmissible as to Klein.

II

One of the most important questions presented on this appeal is: May there be a criminal conspiracy to impede the collection of income taxes without proof that some tax which was payable had not been paid?

The trial court correctly noted that this "is a novel question and one that should be tested * * *" (IV, 2633).

The point was extensively briefed by appellant Haas (Br. 54-68) for himself and the other appellants, Klein and Alprin (Kl. Br. 48, Al. Br. 19).

This vital and novel question is not even dealt with in the Court's opinion.

The Court does state that "the income whose source and nature were being concealed was not primarily the drafts, but the Harwood's profits received much earlier by Klein and the three Canadians" (2231). However, the judgment of acquittal on the first four counts established as the law of the case that the Harwood's profits were not "income of Klein and his three Canadian associates", but were income belonging exclusively to bona fide foreign corporations whose taxes were not involved in the indictment on trial. Hence, it was likewise established as the law of the case that H. H. Klein and his Canadian associates did not owe the Government of the United States any taxes on account of the Harwood's profits.

At another point, the Court states that a jury could properly find that "there was considerable doubt in the minds of Klein and his friends at the time they were selling Harwood's that the corporate entities would be respected by the United States Treasury * * *" (2217). And it is inferred that, as a precaution against the possible resolution of this doubt against him, Klein and the other defendants conspired to conceal the nature and source of the Harwood's income. As it later developed from the acquittal on the first four counts, the doubt was without sound foundation.

Thus, the question is clearly presented as to whether or not there can be a conspiracy to impede the collection of a tax not actually payable but thought by the alleged conspirators to be possibly payable, any more than there can be a conspiracy to murder a dead man mistakenly believed to be alive.

The Internal Revenue Code is a comprehensive enunciation of the rules applicable in the field of internal revenue taxation, including income taxes, and deals at great length with income tax procedure and the Internal Revenue Bureau. Section 145(b) of the Internal Revenue Code makes it a crime to attempt "in any manner to evade or

defeat any tax " " " but is inapplicable unless an additional tax was payable. *U. S. v. Schenck*, 126 F. 2d 702, 704 (2nd Cir. 1942). The older and more general Section 371 of Title 18 of the U. S. Code defines the crime of conspiracy as involving (a) a conspiracy to commit any offense against the United States (which would embrace the conspiracy to violate Section 145(b) which was charged in the Fourth Count) and, in the alternative, (b) a conspiracy "to defraud the United States or any agency thereof in any manner or for any purpose" (which would embrace the conspiracy charged in the Fifth Count).

As the district judge held, a conspiracy to violate Section 145(b) could not be established unless an additional tax was payable. It is submitted that similarly the alternative provision of Section 371 upon which the Fifth Count of the instant indictment was based should be interpreted, in the light of Section 145(b), as having application in the field of internal revenue taxation only where an additional tax was payable.

This question, we repeat, has not been decided by this Court despite its importance and novelty and notwithstanding the sincere doubts expressed by the trial judge as to whether or not he had decided the matter correctly, and his earnest desire for review of his decision by the appellate courts.

III

Having found that the primary object of the conspiracy was to conceal the Harwood's profits, the Court consistently found that the alleged concealment of the existence and nature of the Alprin, Roer, Koerner and Haus drafts had the same primary purpose. In this connection, the Court states that the recipients of the drafts had "a desire which they shared with H. H. Klein to keep from the United States Treasury information which might lead it to conclude that he and the three Canadians had errone-

ously reported their income for the years 1944-1947" (2219).

In evolving a purpose for this alleged concealment of the drafts by the recipients, the Court advances a theory not heretofore conceived by the prosecution nor the lower court, and one based upon clearly erroneous legal premises and not support by evidence. The Court suggests that the drafts, if discovered by the Treasury, might be considered as payment for services rendered "Klein's corporations"; and that, finding that such services had been rendered, "the Treasury might then be more inclined to disregard the corporate veil" and claim that the profits from the whiskey sales were ordinary income to Klein and his associates rather than income to the corporations (2219).

But services in the United States performed by Alprin, Koerner, Roer, Haas and others for the Harwood corporations could not constitute any legal justification for regarding the corporate entities as sham. On the contrary, such activity would form, as it did in the lower court, an important basis for a finding that the corporate entities were real and bona fide, engaging in numerous and substantial business functions and, as such, for tax purposes and other purposes, separate and distinct from the individual owners of their stock. *United States* v. *Klein*, 139 F. Supp. 135 and cases cited

The only legal effect of the allegedly "secret" services performed for the corporations in the United States might be to subject the corporations to United States taxes on the ground that (1) they were engaged in business in the United States and (2) they had income from sources within the United States. Section 231, Internal Revenue Code, 1939. This is the tenor of all the tax opinions in the case, and it is unassailably correct.

Hence, the motive for concealing the drafts ascribed to their recipients by this Court is derived from what, with due deference, seems to be a misunderstanding of the law.

IV

Further misunderstanding of the law is indicated in the Court's suggested basis for finding a tax-evading motive impelling Klein and Rokoff falsely to record the drafts in Tivoli's books as "commissions". Incidentally, recording them in that way would not reduce, but increase, the tax liability of the draft recipients. But the Court says: "This enabled Tivoli falsely to deduct the sums as business expenses" (2219). There is not one iota of evidence that Tivoli took such a deduction or that it was ever interested in doing so. Indeed, as a foreign corporation not doing business in the United States it was not entitled to any deductions from gross income, the United States income tax being imposed, if at all, only on certain items of gross income. Section 231(a), Internal Revenue Code, 1939. And in any case, Tivoli's taxes are not involved in the instant prosecution, which is concerned only with an alleged effort by the individual defendants to impede collection of *their* taxes.

V

A further important and novel question, raised both in the district court and on this appeal, has not been considered in affirming the convictions below. That question is: May the Government by charging income tax evasion in the terms of the conspiracy to defraud statute thereby extend indefinitely the statute of limitations applicable to the crime charged?

Here, by the process of alleging a conspiracy to impede the Treasury in the collection of taxes, the statute of limitations may be extended without end. The Court's opinion clearly demonstrates this. For example, it includes among the overt acts within the statutory period, the statements of Klein, Alprin, Koerner, Roer and Haas made to Internal Revenue agents in the Fall of 1952 (2225). Each of

those individuals who testified at the trial—Klein, Alprin and Haas—repeated without substantial variation the statements they had made to Internal Revenue. Hence, their trial testimony may itself be considered as in furtherance of the conspiracy to conceal. Indeed, this unsuccessful appeal and any subsequent unsuccessful attempts of the defendants to avoid conviction could be similarly regarded. Thus, it is difficult to see how the statute of limitations would ever run, or how the alleged conspiracy could ever be ended by any means short of public confession.

This Court indicates as much in holding that even when the alleged conspirators had split wide apart in 1952 this did not "constitute an end of the conspiracy, for the concealment was not disavowed" (2231). This limitless extension of the statute of limitations has been repeatedly condemned by the United States Supreme Court, most recently in *Grunewald* v. *United States*, 353 U. S. 391, decided after the instant appeal had been argued and submitted for decision.

Moreover, under the *Grunewald* decision it was necessary that the jury be instructed that it had to find, in order to convict, (1) what was the main objective of the conspiracy and (2) that this objective was still being furthered as late as September 18, 1951. The charge of the trial court was fatally defective in failing to include such an instruction.

VI

This Court finds that the main object of the conspiracy was to conceal "the Harwood's profits received much earlier by Klein and the three Canadians" (2231). If this be so, then the judgment of acquittal on the first four counts precluded a conviction on the fifth count. For the acquittal determined that the Harwood's profits were not "received by Klein and the three Canadians"—but rather

"that the seventeen corporations were acceptable for tax purposes and not a sham and that their income was theirs and not that of Klein and his three Canadian associates."

In fact, the basic error that seems to pervade the entire opinion of this Court is its failure to accord proper legal effect to the district court's acquittal of the defendants. From beginning to end the Court erroneously treats the appeal as presenting "issues of income tax evasion" (2214) and regards the case as one in which "tremendous American profits were skillfully concealed from the collectors' eyes" (2237). This the Court does despite the fact that in acquitting on the first four counts the district court ruled tax evasion out of the case and did not submit the case to the jury as one of tax evasion at all. The Court completely ignores the finding of the trial court that the "tremendous American profits" resulting from the Harwood venture belonged not to the individuals on trial, but to bona fide foreign corporations, which were not subject to American taxation.

In effect, therefore, this Court has reversed *sub silentio* the non-appealable judgment of acquittal entered in the district court and has treated the case on appeal as though that judgment had never been made.

In this connection, as we read the Court's opinion (2233), the judgment of acquittal under the fourth count was really without any substantial legal effect. For apparently it makes no difference that the evidence admissible under the fifth count would have been equally admissible under the fourth; by the simple process of including both counts in one indictment, the Government may nullify an acquittal on the fourth count and the findings on which it is based by obtaining a conviction on the fifth (2233-34).

VII

In dealing with another of appellants' major contentions, namely, that the charge against them was radically changed at the trial, the Court takes the technical view that "the appeal largely turns upon issues of federal criminal pleading" (2215).

Actually the appeal presents questions involving basic constitutional rights and the true administration of the criminal law.

The Constitution requires that an accused be fairly apprised of the crime with which he is charged and that he have a reasonable opportunity to defend himself against the charge as made (Fifth and Sixth Amendments). Certainly, under the Constitution no defendant should be misled regarding the nature of the charge against him either by the indictment or by the Government's bill of particulars.

We submit that the Court's approach toward this part of the case is unsound. The Court's philosophy is based on the premise that a defendant charged with crime knows the facts pertaining to his guilt or innocence. From this premise the conclusion is drawn that the Government need not apprise a defendant before trial of the facts—which are thus known to him. Taking the position: "You know what you did," the Government may decline to inform a defendant of what it *claims* he did. Worse still, what information the Government does give a defendant in its bill of particulars as to the Government's claim may prove at the trial gross misinformation and the claim itself may be abandoned and a completely contradictory claim may be asserted.

This reasoning permits indictment in the most general and non-informative terms and reduces to nothing the efficacy of a bill of particulars in a criminal case.

However, the constitutional requirement is not that the Government give a defendant in a criminal case the *facts* of the case; rather, the exaction is that the Government fairly apprise a defendant of the nature of the *claim* or *charge* against him. This, in turn, means that a defendant in a criminal case is at least entitled to protection against *misinformation* by the Government as to the nature of his offense.

The requirement is, we submit, particularly important in the case at bar. Here the defendants are charged with a crime defined in the most general terms as a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose * * *" (18 U. S. C. § 371). As judicially construed, the crime is a conspiracy "to interfere with or obstruct * * * government functions by deceit, craft or trickery or at least by means that are dishonest." *Hammerschmidt* v. *United States*, 265 U. S. 182, 188.

If the indictment had merely charged the crime in these terms, there can be no serious doubt that, unless supplemented by a bill of particulars, it would not have sufficiently apprised the defendants of the charges against them so as to satisfy the requirements of due process. For the same reasons, if the indictment had consisted only of the first paragraph charging a conspiracy "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of the revenue; to wit, income taxes", it would have informed the defendants of nothing beyond the general category of the crime alleged.

Although the Supreme Court has held an indictment so general to be sufficient to withstand a pretrial motion to dismiss, this is because a bill of particulars supplying the essential details of the charge may be required. *Glasser* v. *United States*, 315 U. S. 60, 66.

Therefore, it was of special importance in this case that the defendants receive particularization of the fraud charged, either in the indictment itself or in an informative and binding bill of particulars. In any event, it was of vital importance that they not be misled by statements contained in either document as to the charge against them. It is because, as subsequent events at the trial proved, the defendants were so misled that there was a deprivation of their constitutional rights and a maladministration of the criminal law.

The Court's analogy between the theory-of-the-case doctrine in civil cases and appropriate procedure in criminal prosecutions (2229) is hardly well drawn. The purpose underlying pretrial procedure in civil cases is the avoidance of surprise at the trial and the fullest development before trial of each party's theory of the case and factual contentions. This is the basic reason for the almost unlimited pretrial examination and discovery accorded the parties in civil cases. There is no counterpart of this in criminal prosecutions. The accused is not granted pretrial examination of the Government or its witnesses. And, as this Court's decision in the case at bar illustrates, even the most meager bill of particulars of the indictment is regarded as sufficient. Hence, the theory-of-the-case doctrine, however "baleful" it may be regarded in some quarters, serves a necessary and a salutary purpose in criminal cases, namely, the protection of an accused in his basic right to a fair trial.

The suggestion in this Court's opinion that the Government was without knowledge before trial of the detail of the evidence on the basis of which the charge was made is not in accordance with the facts. Elsewhere in its opinion the Court summarizes the alleged "acts of concealment" which, it says, were established at the trial (2224-25). Every one of these alleged acts of concealment was known to the Government long before the trial. Which of these

acts would be regarded by the Government as acts of concealment were, however, unknown to the defendants, and are still unknown to them. Nor, due to the "alternative patterns of facts" method of trial, no one knows, even now, which of these acts were found by the jury as acts of concealment.

Of these twenty separate acts only three were alleged in the indictment, viz., those numbered in the Court's opinion as (10), (19) and (20)—the filing of allegedly false income tax returns by Roer, Koerner and Alprin. And as to those there was a complete about-face by the prosecution during the trial where, departing from the charge in the bill of particulars that these returns were false, it advanced the new charge that the returns may not have been false after all, but true, and that nevertheless the drafts were so treated by the recipients as to conceal the nature and source of their income. Basically, therefore, the question does not, as this Court regards it, involve "the materiality of allegation relied upon", but rather a serious shifting and complete reversal of a position, basic to the case, taken after due deliberation by the grand jury in the indictment and by the prosecution in its bill of particulars.

VIII

In its treatment of the "prosecution's alternative patterns of facts concerning the nature of the Tivoli drafts", the Court considers only two alternatives: (a) "The drafts as liquidating dividends; and (b) "The drafts as compensation." It omits from consideration the third alternative conceived during the trial by the trial judge and adopted by the prosecutor in summation to the jury, namely, that the drafts "were either" of these alternatives, and that the money was to be given the appearance of a legitimate expenditure by Tivoli until the conclusion of Klein's income tax difficulties (IV, 2228-29).

Yet, it was the departure of the prosecution from the second alternative which had been definitely selected by the grand jury as the correct one, coupled with the injection of the third alternative during the trial, which the appellants contend constituted such a radical alteration of the crime originally alleged as to effect a deprivation of their constitutional rights.

These developments at the trial show the error of Judge Palmieri's ruling in refusing to direct the Government to serve a proper bill of particulars and in holding that the particulars given by the Government were adequate. They also emphasize the salutary purposes of the old and well established doctrine that a conspiracy must be charged in a way to identify it (*United States* v. *Wills*, 36 F. 2d 855, 858), and that a bill of particulars strictly limits the prosecution to proof within the area of the bill. *United States* v. *Neff*, 212 F. 2d 297, 309.

The Court's discussion of the alternative patterns of facts concerning the nature of the Tivoli drafts does, however, establish very clearly that the prosecution's proof, if credited by the jury, showed three separate and distinct conspiracies, rather than the single conspiracy charged.

Under the first alternative—the drafts considered as liquidating dividends—there may have been a conspiracy by Klein and Rokoff to mislead the Treasury as to the true nature of the drafts by their insistence from 1947 right through the trial that the drafts represented "commissions" rather than liquidating dividends. It is perfectly obvious that neither Alprin nor Koerner nor Haas were parties to this scheme. There is not a single fact to connect them with it—to show they even knew of it or that they ever did anything, even unconsciously, to carry it out. They had no motive of personal advantage to achieve by it. To the contrary, Alprin, Roer and Koerner were victimized by it, because by the conduct of Klein and Rokoff they were exposed to the very charge made in the indictment, i.e., that

they filed *false* income tax returns misrepresenting the drafts as liquidating dividends rather than ordinary income.

Under the second alternative—the drafts regarded as compensation—there may have been a conspiracy between Roer, Koerner and Alprin, perhaps aided and abetted by Haas, to conceal the true nature of their drafts by misrepresenting them in their income tax returns as liquidating dividends and insisting upon this version whenever questioned by Treasury officials.

But this Court says, after reviewing the salient facts, that "on the record here Klein, in the period after 1948, could not be considered a party to a scheme by Roer, Koerner and Alprin—to make tax returns on the basis that their drafts were in liquidation of Tivoli" (223). It goes without saying, of course, that Rokoff could not be so considered either. Thus, another separate and distinct conspiracy was established on the basis of the drafts considered as compensation, viz., a Roer-Koerner-Alprin-Haas conspiracy—to which neither Klein nor Rokoff were parties.

There may have been yet a third conspiracy established by the Government, if its proof be given full credence. That was a conspiracy between Klein and Haas involving the La Ribera check. There is no evidence whatever to connect Alprin with this conspiracy. There is no proof that he even knew of its existence and there is not one single fact to establish his participation in it.

Having found a basis for these three conspiracies in the evidence, the trial judge fell into reversible error by failing to give the jury appropriate instructions to distinguish between the three conspiracies and to acquit the defendants if they found that these three, rather than the one single conspiracy charged in the indictment, had been proved. Under the charge as given, the jury could have found all three defendants guilty as follows: Klein and Rokoff guilty of

their conspiracy, although not guilty of the Alprin-Koerner-Roer conspiracy; Klein and Haas guilty of their conspiracy, although not guilty of the Alprin-Koerner-Roer conspiracy; and Alprin guilty of the Alprin-Koerner-Roer conspiracy, although not guilty of the Klein-Rokoff and Klein-Haas conspiracies.

The Court's charge, and particularly those portions quoted in this Court's opinion (2232) was, under these circumstances, wholly inadequate to give the jury proper guidance in their deliberations. To tell the jury, as the trial judge did, merely that there must be a "common purpose or design" was not nearly enough. For all three conspiracies, while having the common purpose and design of misrepresenting facts, had totally distinct and disparate ends—"separate ends similar in character which characterize multiple conspiracies." There was lacking "the single, unified purpose of co-conspirators." Frank, C.J. in *United States* v. *Rosenberg*, 195 F. 2d 583, 600, 601; and see, *Kotteakos* v. *United States*, 328 U. S. 750.

IX

The Court has treated as one of the "miscellaneous facets of the conspiracy" the transfer of $8,000,000 in bonds to Canada in September, 1946 (2223).

In the first place, the Court erroneously treats these bonds as belonging to Klein, thus again ignoring the uncontradicted fact that they belonged to the Harwood *corporations*—bona fide legal entities separate and distinct from Klein, as the trial judge determined in granting acquittal on the first four counts.

Secondly, no attempt is made by the Court, just as none was made by the prosecution, to trace any logical connection between the transfer of these bonds to Canada and a conspiracy to conceal the nature and source of Klein's income, or any resulting impediment suffered by the Treasury in collecting Klein's taxes.

Finally, even assuming this transfer was stimulated by service of an OPA subpoena on the Royal Bank of Canada, there is no probative connection between that circumstance and the crime charged.

Nevertheless, it cannot be gainsaid that evidence of this $8,000,000 transfer, under the unfortunate controversy created by the manner of its introduction, seriously prejudiced the appellants, and especially Klein.

X

In holding that a new trial is not required despite the undeniable prejudice created by all the material put in evidence under the first four counts and later stricken, the Court has taken an erroneous view of the situation thus created and has failed to follow principles well established by higher authority.

The Court seems to consider their predicament to have been of the defendant's creation, suggesting that it became necessary to strike this evidence only because the defendants succeeded in "procuring" directed judgments of acquittal on the first four counts, and stating that "the defendants cannot well complain of that which they brought about" (2228). But, the defendants did not bring about the prejudicial situation at all. The Government, and not the defendants, decided to include all five counts in the one indictment, failed to produce enough proof to sustain the first four counts, and introduced the great mass of evidence under these four counts which later had to be stricken when the counts themselves, owing to deficiencies in the Government's case, failed of proof. The failure of proof was determined as a matter of law by the Court, although on motions which the defendants had the right to make.

Hence, we do not understand the Court's position that any prejudice resulting to the defendants from the stricken evidence is a penalty they must suffer for their acquittal on the first four counts.

It is correctly said that the defendants did not seek a mistrial, but it is incorrectly implied that they thereby waived the prejudice. That the failure to move did not forfeit the objection is clear from *Brasfield* v. *United States*, 272 U. S. 448, 450; *Throckmorton* v. *Holt*, 180 U. S. 552, 567; *New York Central R.R. Co.* v. *Johnson*, 279 U. S. 310; *Pierce* v. *United States*, 86 F. 2d 949, 953, 954, and *Snipes* v. *United States*, 230 F. 2d 165.

XI

This Court has apparently overlooked the question as to whether the standard of evidence applied by the trial judge in denying appellants' motions for judgment of acquittal was erroneous. No mention of the point is made in the Court's opinion.

The standard applied was:

> "Giving the Government the benefit of all reasonable inferences that might logically flow from the evidence, if a reasonable person might conclude guilt therefrom the motion for judgment of acquittal must fail." (II, 717)

While this test has been approved by a majority of the Court in other cases, it has not gained unanimous acceptance even here, and its validity has been seriously questioned (see dissent of Judge Frank in *United States* v. *Castro*, 228 F. 2d 807). The rule is in conflict with that obtaining in other circuits (e.g., *United States* v. *Yoeman-Henderson, Inc.*, 193 F. 2d 867, 869), and is opposed to the test stated by the Supreme Court in *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 493, as follows:

> "In the present case the motions for judgment of acquittal raised the question whether the evidence overcame all reasonable doubt of the guilt of appellees. The ruling on them did not determine whether by the lesser degree of proof required in a civil case appellees might be found to have conspired to fix commissions."

(B) Petition for Stay of Mandate and Continuance of Bail

In the event that the foregoing motion for rehearing is denied, Klein asks that the mandate be stayed and that his present bail be continued pending his application to the Supreme Court for a writ of certiorari.

When Klein was originally arraigned on May 28, 1954 his bail was fixed at $50,000, which he deposited in cash with the clerk of the district court. At the same time an order was made on consent permitting Klein to leave the jurisdiction of the Southern District of New York provided he remain within the continental United States. Following his conviction the district court continued Klein's bail but in the reduced amount of $15,000, pending appeal to this Court, and again enlarged the bail limits to the continental United States. The difference of $35,000 in cash still remains with the clerk of the district court.

Ever since his conviction Klein has resided with his wife and daughter in a house owned by him in Beverly Hills, California, and has remained within the bail limits defined by the court below.

In the event that Klein's petition for rehearing is denied, it is respectfully submitted that serious questions exist to warrant an application to the Supreme Court for a writ of certiorari. It is the intention of appellant Klein to apply promptly for such a writ. It is, therefore, respectfully requested that pursuant to Rule 46(a)(2) of the Federal Rules of Criminal Procedure bail be continued pending application to the Supreme Court in accordance with the local rules of this Court.

For the foregoing reasons, this petition for rehearing or, in the alternative for a stay of the mandate and a continuance of bail should be granted.

Dated: New York, New York,
September 17, 1957.

Davis Polk Wardwell Sunderland & Kiendl,
By Theodore Kiendl,
A Member of the Firm,
Attorneys for Defendant-Appellant
Human Harvey Klein,
Office & P. O Address,
15 Broad Street
New York 5, N. Y.

Certificate of Counsel

State of New York
County of New York } ss.:

Theodore Kiendl, being duly sworn on oath, certifies and says that he makes this Certificate in compliance with Rule 28 of the Rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and not interposed for delay.

Theodore Kiendl.

Sworn to before me this
17th day of September, 1957.

Rose F. Eckert
Notary Public, State of New York
No. 24-6142700 Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1958

No. 593

Office - Supreme Court, U.S.
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NOV 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

HYMAN HARVEY KLEIN, MAURICE HAAS and MORRIS O. ALPRIN,

Appellants.

PETITION OF APPELLANT ALPRIN FOR REHEARING APPEAL AND/OR STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FILED
SEP 17 1957

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PETITION OF APPELLANT ALPRIN FOR REHEARING APPEAL AND/OR STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

Appellant Alprin respectfully petitions for a rehearing of the appeal in the above-entitled cause. If said petition should be denied, appellant Alprin requests a stay of the mandate and a continuance of bail pending application to the United States Supreme Court for a writ of certiorari.

The petition for rehearing is based on two points each of which will be dealt with briefly below:[1]

I

The fourth count charged the appellants with conspiring (1) to evade the income taxes due from Klein and the Canadians through creation of sham corporations and (2) to *conceal* such evasion. The concealment objective was set out in paragraph 17 as follows:

---

1 Appellant Alprin adopts the petitions for rehearing of Klein and Haas, to the extent that the points raised therein are applicable to him.

"17. It was further a part of said conspiracy that the defendants would conceal and continue to conceal the attempts to evade and defeat a large part of the income taxes due and owing to the United States of America set forth in paragraphs 5 through 16 herein."[2]

The opinion of this Court has now made even clearer than before that the fifth count charged a conspiracy to conceal the very same attempt at income tax evasion as was allegedly concealed by the fourth count conspiracy. The Court's opinion traces the concealment in the fifth count to the very origin of the relation between the parties (Opinion, 2217), just as did the allegation and the proof on the fourth count. It then points out that one reason the drafts were handled as they were was because the alleged conspirators "shared [a desire] with H. H. Klein to keep from the United States Treasury information which might lead it to conclude that he and the three Canadians had erroneously reported their income for the years 1944-1947. * * * H. H. Klein * * * was asking them to hold up use of the funds until his income tax liability was safely resolved" (Id., 2219). The conviction of *all* appellants, said the Court, could not be predicated on a single conspiracy to misrepresent the nature of the Tivoli payments. But all "could still be parties to Klein's plot to conceal the payments" (Id., 2223). "The ultimate fact to be found" was "concealment and misleading" (Id., 2230) and the "income whose source and nature were being concealed was not primarily the drafts, but the Harwood's profits received much earlier by Klein and the three Canadians" (Id., 2231).

Concealment of the alleged attempts of Klein *et al.* to to evade taxes was clearly a part of the conspiracy charged

2 I. 137 et seq. Paragraphs 5 to 16 referred to income taxes allegedly due from Klein and the Canadians.

in the fourth count. It was clearly litigated and as clearly resulted in a judgment of acquittal. The question of law posed by it is: what effect will a judgment of acquittal of a conspiracy to do x and y have on a conspiracy to do y alone—y having reference to the concealment?

It is respectfully submitted that this Court has failed to meet that issue. It is no answer to say that, though the trial judge "spoke in terms of acquittal * * *, his action was no different than had he awaited the conclusion of the trial and then declined to submit the particular count to the jury for lack of proof" (Id., 2234). A count so disposed of could not be the subject of another prosecution. And one would be hard put to justify submitting to a jury the very same offense which had just been found to have no support in the record. In the present case, if there was insufficient evidence to take count 4 to the jury when proof of either the tax evasion objective or concealment objective could have sufficed,[1] how can there be sufficient evidence to support a fifth count conspiracy charging the same concealment as in the fourth count?

The answer suggested by a close reading of the opinion is that this Court feels there was sufficient evidence of the concealment objective to have taken the fourth count to the jury and hence disagrees with the judgment of acquittal on that count. But such disagreement does not warrant allowing what was in effect an appeal from the judgment through continued trial of a second count of the same indictment, which simply repeats the charge already adjudicated. Such continued trial subjects an acquitted defendant to a second risk of penalty every bit as much as does a new indictment. Whether the applicable principle be denomi-

[1] *United States v. Lukas*, 61 F. 2d 139, 170 (2 Cir. 1932); *Short v. United States*, 91 F. 2d 614, 622 (4 Cir. 1937); *McWhorter v. United States*, 92 F. 2d 820, 830 (5 Cir. 1933).

nated former jeopardy or *res judicata*, it seeks to prevent repeated *risk* of punishment every bit as much as it prohibits the double punishment itself.[4] It is respectfully submitted that the issue is a novel one which deserves additional hearing by this Court.

II

The Court's discussion of the alternative theories on which the prosecution tried the case and particularly of the one theory which tied both alternatives together, *supra*, demonstrates once again the importance of a point urged by us but not discussed by this Court in its opinion. If all the appellants could have been convicted only on the assumption that they were concealing the Harwood profits from Treasury, rather than on their description of whether the Tivoli drafts were liquidating dividends or commissions, then the failure to grant Alprin's requests S-23 and S-24 (or the oral modification thereof) could not but have been prejudicial. For, aside from the controversy as to the nature of the drafts (which, according to the Court, could not have been the basis for conviction of *all* the appellants), Alprin's relationship to all these matters dealt principally with his holding of the monies paid to him and to Koerner from 1947 to 1952. It is this holding, without reporting to Treasury, which is the essence of Alprin's participation in the concealment from Treasury.

It is one thing to say that the trial judge need not have charged as to "the multitudinous details" involved in this case (Opinion, p. 2233). But it is quite another to refuse the jury any guidance whatever on what was the key issue *as to Alprin*, whatever it may have been as to Klein or Haas. For if Alprin received the monies described above subject to a complete restriction on their use, and such re-

[4] See pages 29 et seq. of our reply brief.

striction had been imposed by Klein, a person authorized to act, and if Alprin did not know Klein's purpose in imposing the restriction, then his behavior could have been found by a jury to be innocent. But without an instruction as to the applicable law, there was no way for the jury to find its way through the maze of facts.

It was for the jury to make the determination with knowledge of the applicable law. We requested appropriate instructions and they were denied. See pages 15-17 of our reply brief. It is respectfully submitted that this point is central to Alprin's defense and deserves explicit consideration by this Court.

III

Appellant Alprin is married, has been a resident of this city all his life and has a son living here. He has been on bail from the very inception of these proceedings in September, 1954. Judge Sugarman continued his bail after the verdict below. It is respectfully submitted that, under all the circumstances, his bail should be continued pending application to the Supreme Court for a writ of certiorari.

For the reasons set forth above, this petition for rehearing, or in the alternative, for a stay of the mandate and a continuance of bail, should be granted.

Respectfully submitted,

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Certificate of Counsel

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

MICHAEL KAMINSKY, being duly sworn on oath, certifies and says that he makes this certificate in compliance with Rule 28 of the Rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and not interposed for delay.

MICHAEL KAMINSKY

Sworn to before me this
16th day of September, 1957.

BENJAMIN M. GANELES
Notary Public, State of New York
No. 60-6453700
Qualified in Westchester County
Commission Expires March 30, 1958

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No. 593

JOHN T. FEY, Clerk

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HYMAN HARVEY KLEIN, MAURICE HAAS, and MORRIS O. ALPRIN,

Appellants.

PETITION FOR REHEARING APPEAL AND/OR STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

Appellant Haas respectfully petitions this Honorable Court for a rehearing in the appeal in the above-entitled matter, and if denied, for a stay of the mandate and a continuance of bail pending an application for writ of certiorari to the Supreme Court of the United States.

I.

In considering the identity of the fourth and fifth counts as to all appellants, this Court overlooks completely that its version of the fifth count is totally different from that urged by the Government and adopted by the trial court below. The Government argued to the court below that the fifth count pertained to the taxes of Alprin, Koerner, Roer, and Haas, whereas the fourth count only pertained to the taxes of Klein and the three Canadians. The trial court was persuaded by this argument to hold that the fourth and fifth counts were therefore dissimilar. This Court, however, views the prosecution on the fifth count as to all appellants as an overt act to conceal

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from the Treasury Department the payments to Alprin, Haas, Koerner, and Roer in order to prevent a disclosure that Klein and the three Canadians evaded their taxes for the years 1944 to 1947 (Op. 2219). Again the fifth count reveals its danger by the complete inability on anyone's part to understand what it charges.

Significantly, this Court in its interpretation agrees with the defendants below that the fourth and fifth counts involve a charge of conspiracy to conceal the profits made by Klein and his three Canadians in order to evade the taxes thereon. The trial court held and so charged the jury that the appellants could be convicted without regard to whether they had paid and properly reported their taxes for the years involved (IV, 2569). In talking about this appeal as presenting "issues of income tax evasion" (Op. 2214), and most significantly that unless the fifth count is upheld, there will be offered "a premium to prospective tax evaders" (Op. 2230), this Court apparently disagrees with the trial court and upholds a conviction not on the fifth count but on the fourth count on which the appellants were acquitted.

II.

This Court held that it did not have to consider the extent to which the fourth and fifth counts were a complete duplication "since it is clear that there is no double jeopardy from differing dispositions of counts of a single indictment at a single trial. The prosecution may allege the same charge in different counts with the protection that only a single penalty is permitted. When there are double penalties we reverse one, not both; and, as is well settled a jury acquittal on one count does not require a reversal of conviction on another count, even though there may seem a surface inconsistency" (Op. 2234). In so holding, this Court overlooked the distinction between the crime charged in the fourth and fifth counts and the types

of crimes in the cases it cites, as well as in *Albrecht* v. *United States*, 273 U. S. 1, 47 S. Ct. 250, 71 L. Ed. 505, and in *Blockburger* v. *United States*, 284 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306, which support the doctrine announced by this Court. In the cases which support the rule announced by this Court, they involve either a single act which constitutes an offense against two statutes or a single act which constitutes one or more offenses set out in the same statute. However, under Section 371 of Title 18, U. S. C., there is only one crime of conspiracy, not two. *May* v. *United States*, 175 F. 2d 994 (C. A., D. C.), cert. den. 338 U. S. 830; *United States* v. *Manton*, 107 F. 2d 834 (2 C.), cert den. 309 U. S. 664.

In *May* v. *United States*, *supra*, the Circuit Court for the District of Columbia, relying upon the opinion of this Court in the *Manton* case, stated:

> "Appellants contend that the conspiracy statute itself describes two offenses. That statute reads: 'If two or more persons conspire either to commit any offense against the United States, or to defraud the United States * * *.' Appellants say that the 'either ... or' shows that Congress meant that a conspiracy to commit an offense against the United States is a different offense from a conspiracy to defraud the United States. *We think that the opinion and decision in the Manton case established a rule contrary to this contention. The court was there dealing with this same statute. The argument was that a conspiracy to violate a criminal statute and to defraud the United States was two offenses. The court, quoting Frohwerk v. United States, said: 'The conspiracy is the crime, and that is one, however diverse its objects.'*" (Emphasis supplied.)

Section 371 of Title 18, U. S. C., contemplates only one crime of conspiracy either to commit an offense against the United States "*or*" to defraud the United States. The issue, thus, is not a question of double punishment for a single act which gives rise to a possible violation of two

separate statutes or of two crimes in a single statute, but, on the contrary, the right of the prosecution to convert into two crimes facts which give rise to only one crime and where only one crime of conspiracy is permitted under the statute. Under this view, an acquittal on the fourth count must dispose of the fifth count as well, since the defendants cannot be tried again for the same offense. *Albrecht* v. *United States*, *supra*.

III.

In upholding the prosecution's right to charge such a conspiracy as contained in the fifth count, this Court has extended the conspiracy doctrine to a point where the Government is now given a gimmick to convict people of conspiring to attempt to evade taxes without having to prove that any taxes were actually due and owing to the United States. In this regard, this Court upholds the trial court below that in a secondary conspiracy as is charged here, normally there need be no showing that the Government suffered any property or pecuniary loss.

A different interpretation must obtain, however, where the function interfered with, *viz.* the interference with the determination of the tax, is nothing more than an attempt to evade the tax. Where an acquittal results on a charge of conspiracy to attempt to evade taxes because no taxes were due and owing, it is inconceivable that a conviction may nevertheless be permitted on the same facts on a charge of conspiracy to impede and interfere with the Treasury Department in determining the true tax by a lesser degree of proof, in that there need be no showing of any taxes due and owing. Neither Congress nor the decisions of the Supreme Court ever intended the use of a secondary conspiracy to achieve this result.

IV.

In holding the jury could have found that Haas, like Alprin-Koerner and Roer, received the La Ribera money "for past services rendered", but to be held by Haas in order to conceal from the Treasury Department information which might lead it to Klein and his three Canadian associates, this Court overlooked the following:

(a) Haas rendered his two tax opinions in 1944 and 1945, but was never shown the alleged "secret" contract between Agencias and R. C. Williams Co. The Government did not dispute this fact below; on the contrary, it told the jury, "One thing is clear: Alprin did not show Haas the provisions of the first two paragraphs of the letter of April 20 * * *" (IX, pp. 2461-2463). Haas, thus, could not have been one of Klein's associates, who, as this Court said, "took steps to hide * * *" the activities of the corporate officers in the United States (Op. 2217).

(b) Haas had nothing whatever to do with the formation of the Cuban corporations in June, 1946, or with the draft payments issued to them in 1947.

(c) The jury could not have properly found that the $35,000 payment to La Ribera was, as this Court states, "for past services rendered", because the trial court categorically held the payment to be a loan and that to consider it as anything else "* * *" would be flying in the face of logic and it would be strictly against the weight of the evidence".

(d) La Ribera was dissolved by Haas in February of 1949. The $35,000 was distributed between Haas and his two partners, and was deposited in their personal bank accounts in New York City. Haas further revealed the transaction in his 1949 tax return filed in March of 1950. The liquidation of La Ribera, and the deposit of the moneys in the New York City bank all took place prior to the written interrogatories submitted by Klein to the Treasury

Department. Indeed, the filing of Haas' 1949 tax return was well in advance of the time that the written interrogatories were signed by Klein. How, then, could Haas conspire with Klein to hide the La Ribera loan when Haas disclosed it in 1949 and 1950, prior to the submission of the interrogatories and more than four years before the indictments were returned.

(c) Klein's failure to discuss the La Ribera situation in his interrogatories can scarcely be considered a culpable act against Haas, who, on the evidence in this record, told Klein to answer the query about La Ribera. Proof of this is further supported by the deposit of the money in Haas' regular bank account in New York City, and disclosure of the transaction in his 1949 tax return.

V.

Haas' legal responsibility for the services he performed as an accountant has been fixed and determined by applicable Treasury Department regulations. This Court overlooked these regulations in holding that the jury could find that Haas, in mechanically preparing the 1947 tax return of Klein from information supplied by Klein and Rokoff, knowingly assisted in the preparation of a false tax return. Both in G. C. M. 14509; XIV-1, C. B. 84, and T. D. 4476 (set out on page 22 of the main brief), Haas can not be held responsible for the truth and accuracy of the information furnished him. *Additionally overlooked and vital to Haas' participation in the preparation of the 1947 Klein return is that the rider to the return, which referred to the Hannes and Tivoli situation and that "the assets of Hannes & Co., S. A. were subject to contingent liabilities", was not Haas' work or advice, but that of the attorneys, McQuigan and Kilcullen, and Root, Ballantine, Harlan, Bushby & Palmer* (III, 1549-1549).

Furthermore, Haas cannot be a conspirator by merely participating in discussions that Klein's client had

with Klein's lawyers as to written interrogatories to be supplied to the Bureau of Internal Revenue in connection with a proposed settlement of Klein's taxes. To allow a jury to hold otherwise places a dangerous and ominous connotation on proper services of an accountant. The result is to require an accountant who seeks to pursue an honorable profession to make an exhaustive investigation and audit before he can safely be free from any criminal responsibility for advice he may give a client. The Treasury Department says in its regulations this is absolutely unnecessary. This Court in effect says it is.

This Court even places a conspiratorial connotation on information supplied by Alprin to Haas concerning the draft Alprin received from Klein. Haas' firm prepared Alprin's tax returns. In connection with the preparation of Alprin's return, Alprin told Haas about the receipt of the draft. Haas repeated what Alprin had told him to the Treasury Department and said he believed him. Not a shred of evidence exists in this record to indicate that Haas should not have believed him or should have had reason to doubt him. The mere receipt of such information from Alprin and Haas' personal belief in that regard cannot permit a jury to hold Haas as a conspirator in a dispute between Klein and Alprin as to the nature of the drafts, or for any other purpose. Yet, this Court says the jury could have found that Haas' statement to the Treasury Department concerning Alprin's conversation was an act of concealment of income.

VI.

In the event this petition is denied, it is respectfully submitted that serious and novel questions exist to warrant an application to the Supreme Court for a writ of certiorari to this Court. Haas has been out on bail since his plea of not guilty to the charge in this case. He has always been